UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWO

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APOGEE RETAIL, NY, LLC d/b/a UNIQUE
THRIFT STORE

Case Nos. 02-CA-133989
02-CA-134059
02-CA-137166

-and-

LOCAL 338, RWDSU/UFCW

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RESPONDENT'S BRIEF IN SUPPORT OF ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully Submitted,

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PRELIMINARY STATEMENT

Respondent Apogee Retail ("the Company") respectfully submits this brief in opposition to the Exceptions raised by General Counsel, following Honorable Judge Raymond Green's decision to dismiss an Unfair Labor Practice Charge asserted against the Company. In the Complaint, the Company was charged with: (1) unlawfully interfering with, restraining, and coercing employees prior to a decertification election; and (2) engaging in "bad faith" negotiations during the collective bargaining process. Judge Green determined that neither charge had any merit whatsoever.

Judge Green's decision demonstrates that he carefully reviewed the hearing record, which consists of the testimony of eighteen witnesses, and hundreds of pages of documentary exhibits. As set forth in Judge Green's decision, the evidence in the record conclusively demonstrates that the Company never, in any way, attempted to interfere with, restrain, or coerce employees. Judge Green properly made credibility resolutions which showed that, at most, one of the Company's agents responded to co-workers' questions regarding wage increases by simply stating that they were "in negotiations." General Counsel has failed to make any reasonable argument which would require the reversal of Judge Green's determination that the Company did not violate Section 8(a)(1) of the Act.

Moreover, the overwhelming evidence presented at the hearing demonstrates that the Company, at all times, bargained in good faith with an unmistakable intent to reach a bargained-for resolution with the Union. Judge Green properly ruled that the Company provided multiple reasons for its objecting to the Union's proposed union security and dues check-off provisions. General Counsel's argument that these legitimate concerns were "fabricated at trial" is completely bereft of evidentiary support. General Counsel, apparently, expected the Company to simply agree

to union security and dues check-off without its valid concerns ever being addressed or resolved. Further, the evidence clearly shows that the Company repeatedly expressed a willingness, readiness, and desire to bargain with the Union regarding the issues, both before and after the date the ULP Complaint was filed. The Company expressed a willingness to meet and bargain at night, on the weekends, and during regular business hours. The Union, however, refused. It is undisputed that the Union – not the Company – discontinued the bargaining process, and declined all further attempts by the Company to bargain.

For the reasons set forth below, Judge Green properly ruled that there was insufficient evidence to substantiate any asserted violations of the Act. The decision demonstrates that Judge Green thoroughly reviewed the entire record, including the demeanor of the parties, and considered all arguments presented by the parties below. Judge Green determined that the Complaint must be dismissed because, as the evidence conclusively demonstrates, Respondent never violated the any provisions of the Act. Therefore, General Counsel's Exceptions must be rejected, and Judge Green's July 30, 2015 decision to dismiss the Complaint should be upheld in its entirety.

BACKGROUND

Respondent Apogee Retail ("the Company") is a company that operates thrift stores. (Tr. at p. 653.)[1] The Company purchases merchandise through non-profit organizations, on a bulk basis, and re-sells the items in its twelve stores. (Tr. at p. 653.) Dave Kloeber is the CEO and President of Apogee. (Tr. at p. 653.) Mr. Kloeber has been in the thrift store business for 35 years. (Tr. at p. 682.) One of the Company's stores, Unique Thrift Store, is located in Riverdale; a neighborhood of the Bronx, NY ("the Riverdale store"). (Tr. at p. 26.) Mr. Sameh Mekhueil has

[1]All citations to the Hearing Transcript will be referenced herein as "Tr. at p. __."

been the Store Manager of the Riverdale store from 2009 to present. (Tr. at p. 26-27.) Mr. Mekhueil reports to General Manager Dave Morley. (Tr. at p. 27.) Mr. Morley currently manages five stores, including the Riverdale store. (Tr. at p. 186.). Mr. Morley has been the General Manager for approximately ten years, and reports directly to Mr. Kloeber. (Tr. at pp. 186-87.)

In June 2013, following an election, the Retail Wholesale and Department Store Union ("RWDSU") became the bargaining representative of employees in the Riverdale store. (Tr. at pp. 653-54; 375.) Aside from Riverdale, no other Apogee store has ever been unionized. (Tr. at pp. 681-82.) After the election, Mr. Kloeber retained Stuart Weinberger, Esq., of Goldberg & Weinberger LLP, to bargain with the RWDSU on behalf of Apogee. (Tr. at pp. 654; 708.)

Representatives from Apogee and the RWDSU met and negotiated on five occasions in 2013. (Tr. at p. 708.) In the course of those negotiations, the RWDSU made contract proposals which included provisions containing union security and dues check-off. (Tr. at p. 708.) The union provision proposed by the RWDSU concerned Mr. Weinberger, as he believed it to be unlawful on its face. (Tr. at p. 708.) As such, Mr. Weinberger expressed his concern regarding the legality of the union security provision during negotiations with the RWDSU. (Tr. at pp. 655; 708.) However, during said negotiations, Mr. Kloeber and Mr. Weinberger never expressed an unwillingness to agree to a contract that included a union security or dues check-off clause. (Tr. at pp. 655; 711.)

In January 2014, there was a meeting held between Mr. Kloeber, Mr. Weinberger, and representatives from Local 338 ("the Union"). (Tr. at pp. 655-56.) Mr. Neil Gonzalvo and Mr. Jack Caffey attended the meeting as representatives of the Union. (Tr. at pp. 655-56.) Mr. Gonzalvo is the Director of Contract Administration and Research at Local 338. (Tr. at p. 550.) Specific contract proposals were not discussed at the January 2014 meeting. (Tr. at pp. 555; 656.) Rather,

according to Mr. Gonzalvo, the purpose of the January 2014 "meet and greet" was to ensure that the company would not oppose the RWDSU transferring bargaining rights to Local 338. (Tr. at pp. 554-55.) In late March or early April 2014, bargaining rights were transferred from the RWDSU to Local 338. (Tr. at pp. 376; 551.) On April 25, 2014, Mr. Weinberger sent an e-mail to Mr. Gonzalvo which included the proposals and counter-proposals that the Company and the RWDSU had exchanged throughout the negotiations that took place in 2013. (Brief Ex. A.)[2] The Company and Local 338 engaged in collective bargaining negotiations from May 1, 2014 through August 4, 2014.

PROCEDURAL HISTORY

. On August 4, 2014, the Union filed an Unfair Labor Practice Charge against Respondent in Case No. 02-CA-133989, asserting that the Company engaged in "bad faith" negotiations during the collective bargaining process, in violation of Section 8(a)(5) of the Act. On the following day, August 5, 2014, the Union filed a charge in Case No. 02-CA-134059, asserting that the Company unlawfully interfered with, restrained, and coerced employees prior to a decertification election held on August 8, 2014, in violation of Section 8(a)(1) of the Act. The Union amended the charge in Case No. 02-CA-134059 on September 19, 2014, and again on December 4, 2014.

On January 30, 2015, the General Counsel, by the Regional Director of Region 2 of the National Labor Relations Board, issued an Order Consolidating cases, Consolidated Complaint, and Notice of Hearing. (Brief Ex. U.) On February 12, 2015, Respondent filed an Answer to the Complaint, denying the allegations raised therein. On March 5, 2015, General Counsel issued an

[2] All citations to the exhibits annexed to Respondent's brief in opposition to the General Counsel's Exceptions are referenced herein as "Brief Ex. __."

Amendment to the Consolidated Complaint. On March 9, 2015, Respondent filed an Answer to the Amended Complaint, again denying all allegations of misconduct.

A hearing was held between March 31, 2015 and April 6, 2015, before Honorable Administrative Law Judge Raymond P. Green. The hearing lasted four days. On May 26, 2015, the parties submitted post-hearing briefs. On July 30, 2015, Judge Green issued a Decision and Recommended Order, dismissing the Complaint in its entirety. (ALJ Decision at p. 16; ln 4-5.)[3] Specifically, with respect to the Section 8(a)(1) allegations, Judge Green ruled that "any statements to employees to the effect that wages are frozen pending the outcome of negotiations is simply a statement of what is permissible under the Act and as such cannot violate Section 8(a)(1) of the Act." (ALJ Decision a p. 11; ln 17-19.) Further, with respect to the Section 8(a)(5) allegations, Judge Green ruled that "the evidence in this case shows that the parties bargained in good faith . . . it is therefore my opinion that the evidence cannot show that the Employer was engaged in surface bargaining and that it had no intention of reaching an agreement." (ALJ Decision at p. 15; ln 43-49.)

POINT I (GC EXCEPTION #1)

JUDGE GREEN WAS NOT REQUIRED TO CONSIDER NAOMI SANTANA'S STATUS AS A § 2(11) "SUPERVISOR" FOR PURPOSES OF DETERMINING THE § 8(A)(1) ALLEGATIONS

General Counsel asserts that Judge Green erred in "failing to consider evidence" that Naomi Santana was, as alleged in the Complaint, a "supervisor" for purposes of § 2(11) of the Act. This argument must be rejected.

[3] All references to Judge Green's Decision, dated July 30, 2015, are hereinafter cited as "ALJ Decision at p. __; ln__."

First, as set forth in General Counsel's brief, Judge Green did not preclude the Union from presenting evidence of Ms. Santana's status within the store. Indeed, in its case-in-chief, General Counsel introduced four witnesses – Abiel Ventura, Jose Tavira, Roseaura Tolentino, and Marlon Colon – who each testified regarding Ms. Santana's job duties, and her role with respect to hiring and discipline. (G.C. Brief at p. 5-6.)[4] Thus, any contention that Judge Green improperly limited General Counsel from presenting such evidence is simply false. However, Judge Green properly ruled that once Ms. Santana's status as an "agent" of the Company within the meaning of § 2(13) was established, her status as a § 2(11) "supervisor" was irrelevant, because as an agent, any statement by Santana would nevertheless be attributable to the Company. In particular, at the hearing, Judge Green ruled as follows:

> While we were off the record, the Respondent offered to admit that Naomi Santana, who also has a different name, is an Agent of the Respondent of Section 2(13) of the Act; an admission which I would have found anyway in as much as it's clear from the testimony that pursuant to the training that she and Sam got in terms of the Union situation, that they were authorized by the Company to respond to employees' inquiries regarding wages, benefits or other inquiries related to the Union; therefore anything she said during those particular conversations would be – would make the Company responsible if those statements were illegal…

(Tr. at p. 889.) Judge Green's decision reflected the rationale of this ruling, as he noted "because the Respondent admits that she is its agent pursuant to Section 2(13), it is unnecessary to make a finding as to her supervisory status inasmuch as any statements that she made to employees about the Union were authorized by the Company and are binding on it." (ALJ Decision at p. 2; ln 24-28.) It is well settled that "an employee's statement may be attributed to the employer if the employee is 'held out as a conduit for transmitting information [from the employer] to other employees." In re D & F Industries, Inc., 339 NLRB 618, 619 (2013). Therefore, because it was

[4] All citations to General Counsel's Brief in Support of Exceptions, dated August 27, 2015, are referenced herein as "G.C. Brief at p. __")

acknowledged by Respondent that Santana was an "agent" of the Company, Judge Green properly ruled that her status as a "supervisor" was irrelevant.

General Counsel's argument that Santana's status as a § 2(11) supervisor was necessary for determining whether her statements were "coercive" misses the mark for several reasons. First, the cases cited by General Counsel are clearly distinguishable from the case at bar. In Allied Medical Transp. Co., 360 NLRB No. 142 (2014), the Board found that the company's Chief Executive Officer interrogated employees, and terminated employees in retaliation for their support of the union. As such, in its conclusion, the Board noted that the unfair labor practices were committed by "a high ranking management official." Id. at 20. Ms. Santana's status within the Riverdale store cannot be seriously compared with that of a CEO. Any proposition that Ms. Santana could be considered a "high ranking official" within the Company is ridiculous. Moreover, the Board's decision in Allied Medical Transp. Co. is completely devoid of any analysis regarding the distinction between statements made by a supervisor and those made by an agent.

General Counsel's reliance on Consec Security, 325 NLRB 453 (1998) is similarly misplaced. In that case, the company's Operations Manager threatened employees with termination for striking, and removed employees from their assigned positions. Id. at 455. In contrast, here, it is undisputed that Ms. Santana was not even the manager of the Riverdale store; that position was held by Sameh Mekhueil. (Tr. at p. 26-27.) None of the employees testified that they believed that Ms. Santana was the manager of the Riverdale store. Moreover, while the Complaint alleged that Mr. Mekhueil made coercive and threatening statements, only one of ten employee witnesses (Ms. Tolentino) testified in support of that allegation.[5] Further, the Consec

[5] General Counsel appears to have abandoned its charge that Mr. Mekhueil made statements that were in violation of Section 8(a)(1) of the Act, as Judge Green dismissed all such claims regarding statements attributable to Mr. Mekhueil, and General Counsel has failed to appeal said determination.

Security decision does not, in any way, imply that statements made by a supervisor are somehow more coercive than those made by agents. Thus, the Board's decision in Consec Security lends no support to General Counsel's argument here.

Lastly, General Counsel cites Rossmore House, 269 NLRB 1176 (1984). In that case, the Board ruled that a hotel manager's interrogation of employee regarding his interest in forming a union was ***not*** coercive under Section 8(a)(1). Id. at 1777-78. Nevertheless, General Counsel points out that the Board notes, in a footnote, that when considering whether an interrogation violates the Act, it may consider the identity of the questioner. Id. at 1178 fn. 20. Respondent does not dispute that the identity of the person making the statement is a necessary factor to consider when reviewing the context of a particular situation. Clearly, the identity of the speaker is relevant for purposing of determining whether or not the statements are attributable to the employer. However, the Board in Rossmore House does not state, imply, reference, or even suggest what General Counsel is asserting here – that a statement made by a low level "supervisor" is inherently more coercive than a statement made by an agent. In fact, General Counsel has failed to cite ***any*** legal authority supporting the proposition that a statement made by a "supervisor" is inherently more coercive than a statement made by an "agent." Indeed, there are myriad situations wherein a statement from an agent of a company, with no supervisory authority over an employee, could be considered ***more*** coercive than if it were made by a supervisor. The distinction is irrelevant.

It undisputed that, had Santana in this case made threatening or coercive statements as an agent of the Company, Respondent would be in violation of Section 8(a)(1). Likewise, had Santana made threatening or coercive statements as a "supervisor," Respondent would be in violation of Section 8(a)(1). Thus, whether or not Santana was considered a "supervisor" or "agent" has no impact on the analysis whatsoever. In both scenarios, the statements in question are imputed to the

Company. If statements in question are improper, a speaker's status as a supervisor makes them no more violative of the Act than had he or she been an agent. In any event, in this case, the statements were lawful.

Here, the critical inquiry for purposes of deciding whether a Section 8(a)(1) violation occurred was: (1) determining whether Santana ever made any statements to the Company's employees regarding the union; and, if so (2) determining what was actually stated by Santana in these conversations. Judge Green ruled that Ms. Santana did have at least some discussions regarding union negotiations with Ventura, Tavira, and Tolentino. (ALJ Decision at pp. 9-10.) However, he ruled that "the credible evidence shows that at most, Santana, on perhaps one or more occasions, told employees that because the Union and the Company were in contract negotiations, wages were frozen because of those negotiations . . . [a]ccordingly, any statements to employees to the effect that wages are frozen pending the outcome of negotiations is simply a statement of what is permissible under the Act and as such cannot violate Section 8(a)(1) of the Act." (ALJ Decision at p. 11; ln 1-3.) Thus, the ***content*** of the alleged statements made by Santana, Judge Green properly ruled, was permissible under the Act. Santana's status as a "supervisor" or "agent" of the Company would have no effect on this finding. Indeed, Santana could have been the President of the Company when she made the statements, and they still would have been permissible under the Act, because the statements themselves were lawful.

General Counsel's Exception #1 must therefore be dismissed.

POINT II (GC EXCEPTIONS #2-4)

JUDGE GREEN PROPERLY AND CORRECTLY DETERMINED THE CREDIBILITY OF THE WITNESSES

General Counsel's argues that Judge Green's "credibility resolutions are in error." (G.C. Brief at pp. 9-10.) In particular, General Counsel takes issue with Judge Green's determination that Naomi Santana was a credible witness. It is well settled that "credibility resolutions are peculiarly within the province of the Trial Examiner." El Paso Natural Gas Co., 193 NLRB 333, 343 (1971). As such, "the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." Centerline Construction Company, 347 NLRB 322, 337, fn. 1 (2006); (citing Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)); see also Bardcor Corp., 276 NLRB 1174 (1985) ("it is the province of the administrative law judge and not the General Counsel to make these credibility resolutions.") General Counsel has failed to show that the "clear preponderance of the evidence" requires reversal of Judge Green's credibility determinations.

The Board has made clear that "it is axiomatic that the demeanor of witnesses is a factor of consequence in resolving issues of credibility and that we will attach great weight to an administrative law judge's findings insofar as they are based on demeanor, as he or she, not the Board, has the advantage of observing witnesses while they testified." Harowe Servo Controls, Inc., 250 NLRB 958 (1980) (internal citations omitted). Indeed, "the Board is particularly loathe to reverse a Hearing Officer's credibility findings when witness demeanor has been a factor in the evaluation of conflicting testimony." Triple A Machine Shop, 235 NLRB 208, 209 (1975). General Counsel makes the blanket assertion that Judge Green's "credibility resolutions were not based on witness demeanor." (G.C. Brief at p. 9.) However, in his decision, Judge Green makes

clear that his findings and conclusions were based on "the entire record, ***including my observation of the demeanor of the witnesses***." (ALJ Decision at p. 2; ln 4-5.) (emphasis added). Contrary to General Counsel's implication, Judge Green was not required to repeat, after each of his factual findings, that said conclusions were explicitly "based on witness demeanor." Nevertheless, the fact that Judge Green noted that some of his findings were based on other factors, such as corroborating testimony from other witnesses, does not mean that said findings were based solely on such corroboration, and not also witness demeanor. Indeed, it should be noted that while Judge Green's decision was, in fact, based in large part on witness demeanor which he observed, there was, in addition, overwhelming evidence in the record to support his findings that Santana was a credible witness. For example, in addition to his finding that Santana testified "credibly" while on the stand, Judge Green noted that her testimony was corroborated by several other witnesses, including Mr. Mekhueil and Ms. Kirsey Gonzalez. With respect to Ms. Gonzalez, Judge Green noted:

> Kirsey Gonzalez, an employee called by the Respondent, testified that on one occasion she asked Santana about a wage increase and that Santana replied that everything was in negotiations and that she could not talk about it. This testimony was consistent with the testimony of those General Counsel witnesses who testified that during their conversations with Santana, the latter mentioned negotiations and/or that things were frozen during negotiations.

(ALJ Decision at p. 10; ln 24-45.)

Moreover, the record demonstrates that Judge Green's ultimate finding that no Section 8(a)(1) violation occurred did not solely depend on his finding that Santana was a credible witness. In short, even if Judge Green erred in determining that Santana's testimony was credible (which he did not), there was substantial evidence in the record to show that Respondent never violated the Act. Indeed, several of the witnesses called by General Counsel changed their testimony upon being cross-examined by counsel, thus clarifying their version of events to show that there was no violation. For example, upon being cross examined, Mr. Jose Tavira confirmed that when he

approached Ms. Santana and asked her about wage increases, she told him that everything was "frozen," because the Company was "in negotiation." (Tr. at pp. 262; 274.) There was one co-worker present for this conversation, but she did not appear at the hearing. Judge Green's factual finding as to this conversation, thus, did not depend entirely on his determination that Santana was a credible witness. It was also based on Tavira's own testimony. (ALJ Decision at p. 10; ln 1-15.)

In addition, Judge Green made some of his factual findings based on the corroboration, and non-corroboration by witnesses. Some of General Counsel's witnesses' testimony was so inherently incredible, that no reasonable fact finder would believe them. Roseaura Tolentino's testimony as to certain statements allegedly made by Dave Kloeber, Santana and Mekhuiel was not only denied by Kloeber, Santana and Mekhuiel, but flatly contradicted by each of the other nine employee witnesses who testified, including the witnesses who testified on behalf of General Counsel. (Tr. at pp. 173-74; 335-36; 385-86; 812-13; 860-61; 877-78; 908-09; 937-38.) As such, Judge Green properly determined Tolentino to be an incredible witness, finding as follows:

> With respect to this person's testimony, I note that although there was testimony by other witnesses about the subject of raises and negotiations, none corroborated Tolentino's testimony that these statements were made at the morning meetings or over the public address system. Also, no one corroborated her testimony that they were told that employees could look for jobs elsewhere.

(ALJ Decision at p. 9; ln 30-35.) Thus, Judge Green's determination that Santana was a credible witness may not have even been the primary basis for determining that she never made the statements alleged by Tolentino. Rather, the complete lack of corroborating testimony from witnesses to support Tolentino's statements likely also led Judge Green to that conclusion.

Further, with respect to Marlon Colon, it was both Santana's credibility and the corroborative testimony provided Ms. Shaniqua McNeil, which led Judge Green to reasonably find that the statements allegedly made by Santana never occurred. Mr. Colon testified that Ms. McNeil

was the only witness to an alleged conversation he had with Santana on the bus ride home from work. (Tr. at pp. 366-67.) However, Ms. McNeil, who is no longer employed by the Company, provided testimony which completely corroborated Santana's account of events, and completely contradicted Colon's testimony. (Tr. at pp. 838-39.)

Finally, General Counsel's argument regarding Judge Green's determination with respect to employee wages must also be rejected. Specifically, General Counsel asserts that Judge Green relied on "blatantly incorrect facts, used to justify his decision to discredit employee witnesses." (G.C. Brief at p. 12.) In particular, General Counsel takes issue with Judge Green noting that "in relation to their testimony about statements regarding raises, I note that almost all of the Company's employees, except or leads or persons labeled as supervisors (such as Santana) received the minimum wage." (ALJ Decision at p. 9; ln 5-8.) This finding of fact is not, as General Counsel asserts, inaccurate. At the hearing, the parties heard testimony from five employee witnesses who would not be considered "lead persons" or supervisors: Ventura, Tavira, McNeil, Colon, and Tolentino. With the exception of Tolentino, who has been working at the Company since 2008, ***all*** of the non-leadperson witnesses testified that they received minimum wage. (Tr. at p. 150; 260; 369; 380; 841.) Further, said witnesses' testimony clearly shows that they only received raises when the Federal minimum wage increased. (Tr. at p. 260; 380; 841.) Judge Green's determination, therefore, was entirely consistent with this evidence. Moreover, contrary to the conclusory statements contained in General Counsel's brief, there is no indication that Judge Green was basing his ***credibility*** determinations on the witnesses' respective testimony regarding wages. Rather, it is likely that his findings regarding employee salaries and wage increases related to whether or not Santana's alleged remarks could be considered coercive, or a promise of benefit.

The decision makes clear that in determining credibility, Judge Green relied on witness demeanor, and corroborative statements made by other witnesses who testified at the hearing, and not, as General Counsel argues, "blatantly incorrect facts." Judge Green's determination as to witness credibility is entitled to substantial deference. In order to reverse the credibility determinations made by Judge Green, General Counsel was required to prove that the evidence clearly demonstrates by a preponderance of the evidence that his factual findings based on said determinations were erroneous. General Counsel has utterly failed to do so. Because there is ample evidence in the record to support Judge Green's conclusions regarding witness credibility, General Counsel's Exceptions #2-4 must dismissed.

POINT III (GC EXCEPTION #5)

JUDGE GREEN CORRECTLY RULED THAT ABIEL VENTURA'S TESTIMONY DID NOT SUPPORT GENERAL COUNSEL'S CASE

General Counsel asserts that Judge Green did not credit Mr. Ventura's testimony regarding one conversation he alleged that he had with Santana "based on his apparent conclusion that Ventura could not recall when the conversation occurred." (G.C. Brief at pp. 14-15.) General Counsel states that "this conversation is encompassed by the Complaint."

Contrary to the conclusory assertions of General Counsel, Judge Green does not state, anywhere in his decision, that he did not consider this alleged conversation because it was not encompassed by the timeframe set forth in the Complaint. Rather, Judge Green simply noted that "Ventura also testified that he had another conversation with Santana, but could not recall when that occurred." (ALJ Decision at p. 9; ln 43-45.) Judge Green could have easily determined that Ventura's inability to recall when the conversation occurred was an indication that Ventura was not a credible witness. Such a determination was entirely Judge Green's to make.

Nevertheless, even assuming *arguendo* that Judge Green did disregard that alleged conversation, it was entirely proper to do so, as it was, in fact, beyond the scope of the allegations of the Complaint. General Counsel speculates that "one can therefore conclude that the second conversation Ventura described occurred sometime around June 27, well within the mid-June through August 7 timeframe set forth in the Complaint." (G.C. Brief at p. 14.) However, such a finding would directly contradict Ventura's own testimony in this case. Specifically, while Ventura testified that while he could not recall exactly when the conversation occurred, he stated that it was "probably" in May. (Tr. at pp. 147-48.) This was based on Ventura's recollection that it was "warm outside," when the conversation occurred. (Tr. at pp. 165-166.) Thus, based on his testimony, it was certainly possible that the alleged conversation occurred even before May, on a warm day in March or April, for example. Nevertheless, General Counsel's exception must be rejected because in essence, it is requesting that the Board create a fact that is not in evidence.

General Counsel's reliance on Detergents, Inc., 107 NLRB 1334, 1337 (1954) is unavailing. In that case, the Board noted that "the Trial Examiner is of the opinion that uncertainty as to the exact date of an exchange of words is a common human experience, and that a witness's candid admission that he cannot fix the precise day and hour of an event of this nature is not, at the same time, a confession that the event did not occur." In that case, the issue was whether or not a witness's inability to recall the date of a conversation stands for the proposition that said conversation never occurred. The Board's ruling in that case did not relate to whether the conversation occurred within the timeframe set forth in the Complaint.

The record clearly shows that Ventura did ***not*** testify that the alleged conversation occurred in June. Rather, Ventura testified that it likely occurred in May. To conclude now that the conversation actually occurred in June, when there is no actual evidence in the record to support

such a finding, would be clearly erroneous. If General Counsel sought to establish that the conversation occurred in June 2014, the opportunity to do so was during the hearing. General Counsel failed to do so.

Finally, Judge Green ruled that the statements that Santana did make to her co-workers were lawful under the Act. Specifically, Judge Green credited Santana's testimony that she told Ventura and others, when asked about wage increases, that they were "in negotiations." (ALJ Decision at p. 11; ln 8-11.) Given that the statements made by Santana were lawful, the timeframe of the alleged conversation is irrelevant.

General Counsel's Exception #5 must therefore be dismissed.

POINT IV (GC EXCEPTION #6)

JUDGE GREEN CORRECTLY RULED THAT SANTANA'S STATEMENTS WERE PERMISSIBLE UNDER THE ACT

General Counsel asserts that Judge Green erred in ruling that the statements Santana allegedly made were permissible under Section 8(a)(1) of the Act. This contention fails for several reasons.

First, it should be noted that at the hearing, General Counsel attempted to present evidence of allegedly coercive conversations that Santana had with employees Ventura, Tavira, Tolentino, and Colon. In its exception, however, the only challenge raised by General Counsel relates to the statements allegedly made by Santana to Ventura. Thus, General Counsel appears to concede that Santana never made any statements to Tavira, Tolentino, or Colon which were coercive or threatening.

At the hearing, Mr. Ventura testified that he heard Ms. Santana speaking about wage increases on two occasions, and only two occasions. (Tr. at pp. 173-74.) According to Mr. Ventura,

in August 2014, Ms. Santana approached him and spoke to him privately. (Tr. at p. 143, 145.) Specifically, Mr. Ventura testified as follows:

> Q: So I understand the conversation, she – approaches you at the bricka table, she asks you to accompany her – please accompany her to the bail area, and she tells you that she's not in favor of the union, that she used to get more raises but not now, and that was the extent of the conversation?
>
> A: Yeah.

(Tr. at p. 164.) Mr. Ventura confirmed that nothing else of substance was said by Ms. Santana during the conversation:

> Q: Okay, so let me back up a little bit here. Now, so the first thing she said to you was she's not in favor of the union, she used to get all these raises but now she doesn't, correct?
>
> A: Correct.
>
> Q: Okay. What else did she say?
>
> A: That was pretty much it. That was the conversation.

(Tr. at p. 162.)

Mr. Ventura also testified that Ms. Santana spoke to him at some point prior to the alleged August 2014 conversation, probably in May, when it was warm out. (Tr. at p. 147-48; 165.) According to Mr. Ventura, the two conversations he had with Ms. Santana were "identical." (Tr. at p. 168.) Mr. Ventura acknowledged that Ms. Santana referenced the word "negotiations." (Tr. at p. 169.) According to Ms. Santana, Mr. Ventura approached her on one occasion in 2014, and asked her about wages. (Tr. at p. 926.) Ms. Santana stated "its in negotiation," and told him to go back to work. (Tr. at pp. 926-27.) Santana denied telling any employees that they were weren't getting wage increases because of the union. (Tr. at pp. 927, 939.) The evidence in the record shows that Ms. Santana received extensive training from consultant Mike Rosado, and attorney Lewis Goldberg regarding what she could and could not say to employees who asked her about

wages and benefits. (Tr. at pp. 924-25.) Ms. Santana testified that that she was instructed to tell employees who approached her and asked about wages that the company was "in negotiations." (Tr. at p. 925, 941.)

Judge Green heard the accounts from both witnesses at the hearing. It is undisputed that "it is the province of the administrative law judge and not the General Counsel to make these credibility resolutions." Bardcor Corp., 276 NLRB 1174 (1985). In resolving such credibility, Judge Green properly determined that "I think it is more probable than not that [Santana] merely followed orders and told them that wages were frozen and that she could not say anything else about the matter because the Company and the Union were in the middle of negotiations." (ALJ Decision at p. 11; ln 8-11.) Judge Green's finding was supported by the testimony of Kirsey Gonzalez, who testified that when she asked Santana about wage increases, Santana replied by stating that "everything was in negotiation," and that "it cannot be commented on." (Tr. at p. 917.) General Counsel has failed to present any evidence which would justify reversing Judge Green's factual findings regarding Santana's conversation with Ventura.

Moreover, even if Mr. Ventura's account of the conversations were credited, Ms. Santana's statements were not improper. The Board has long held that "an employer has a fundamental right, protected by Section 8(c) of the Act, to communicate with its employees concerning its position in collective-bargaining negotiations and the course of those negotiations." United Technologies Corp., 274 NLRB 1069, 1074 (1985). Further, "an employer is entitled to explain the advantages and disadvantages of collective bargaining to its employees in an effort to convince them that they would be better off without a union." Winkle Bus Company, Inc., 347 NLRB 1203, 1205 (2006). Ms. Santana was certainly permitted to express her opinion regarding whether or not she was in favor of the union. See NLRB v. Gissel, 395 U.S. 575, 617 (1969) ("an employer's free speech

right to communicate his view to his employees is firmly established and cannot be infringed by a union or the Board."). Further, even if Ms. Santana told Mr. Ventura that voting for the Union was not in ***his*** best interests, said speech would be protected under Section 8(c). See Winkle Bus Company, Inc., 347 NLRB 1203, 1220 (2006) (ruling that company owner's statement that "in your case the Union is not good for you," was not coercive, but rather "simply a general statement of [employer's] opinion regarding the merits of union representation."); Mesker Door, Inc., 357 NLRB No. 59 slip op 37 (2011) ("an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1) provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees."); Luxuray v. NLRB, 447 F.2d 112, 115-17 (2d Cir. 1971) (exhibition of anti-union film expressing negative opinion of past local unions and speculating that similar abuses might accompany future unionization was protected speech under Section 8(c)). Thus, General Counsel's argument that the Company violated Section 8(a)(1) as a result of the alleged statements by Ms. Santana to Mr. Ventura is without merit.

General Counsel's Exception #6 must be denied.

POINT V (GC EXCEPTION #7)

JUDGE GREEN PROPERLY REJECTED GENERAL COUNSEL'S ARGUMENT THAT THE COMPANY VIOLATED THE ACT BY TELLING EMPLOYEES THAT WAGES WERE IN NEGOTIATIONS

General Counsel asserts that Judge Green "did not consider" its argument that even if the testimony of the Company's witnesses was credited, Respondent nevertheless violated Section 8(a)(1) of the Act. (G.C. Brief at p. 16.) General Counsel is grasping at straws.

Significantly, in his decision, Judge Green specifically states that he considered the parties briefs. (ALJ Decision at p. 2; ln 4-5.) Simply because Judge Green did not explicitly include an

analysis of every argument presented by the parties in their voluminous briefs does not mean that he did not "consider" them. Rather, it is likely that Judge Green considered General Counsel's argument, and deemed it without any merit whatsoever.

In essence, General Counsel is advancing the proposition that if Santana told co-workers that wage increases were the subject of negotiations with the union, and that she could not comment further, the Company ***still*** violated Section 8(a)(1) because, as General Counsel blindly asserts, the Company was not bargaining in good faith. This argument fails for several reasons. First, General Counsel has failed to point to any legal authority to support its argument that an employer somehow violates Section 8(a)(1) if one of its agents responds to inquiries from co-workers regarding raises by telling them that its "in negotiations." This is precisely what Santana told her co-workers when she was approached about the topic. The notion that such a response would constitute a threat, coercion, or interference with workers' rights under the Act is, frankly, absurd, as it is contrary to applicable case law and common sense.

The cases cited by General Counsel do not support General Counsel's argument. The Board decisions cited, M.D. Miller Trucking & Topsoil, Inc., 361 NLRB No. 141 (2014), E.L.C. Electric, Inc., 344 NLRB 1200 (2005), and Alterman Transport Lines, Inc., 308 NLRB 1282 (1992), simply reinforce the well-established principle that when determining whether a Section 8(a)(1) violation has occurred, the Board reviews the context in which the statements were made, and the totality of the circumstances. See Rossmore House, 269 NLRB 1176 (1984). In this case, General Counsel's argument rests on the theory that the Company was, at the time of Santana's statements, refusing to bargain in good faith. As set forth below, Judge Green properly determined the opposite was true – that "the evidence in this case shows that the parties bargained in good faith and in fact, reached agreement on all subjects except for the union dues/checkoff provisions." (ALJ Decision

at p. 15; ln 43-45.) Indeed, the record clearly shows that Respondent was at all times fully engaged in good faith bargaining with the Union. Moreover, it is undisputed that Santana never attended any bargaining sessions between the Company and the Union, and therefore had no knowledge regarding the parties' respective positions, or the status of the negotiations. (Tr. at pp. 938-39.) Thus, any argument that the Company was bargaining in bad faith and that Santana somehow ***knew*** that the Company was bargaining in bad faith when she told others that wage increases were "in negotiations" must be rejected.

General Counsel's Exception #7 should therefore be denied.

POINT VI (GC EXCEPTION #8)

JUDGE GREEN CORRECTLY DETERMINED THAT NO SECTION 8(A)(1) VIOLATIONS OCCURRED, AND THEREFORE DID NOT ERR BY NOT RECOMMENDING A NOTICE POSTING REMEDY

For the reasons set forth above, Judge Green properly determined that the evidence in the record demonstrated that the Company did not violate Section 8(a)(1) of the Act. Therefore, Judge Green did not err by not recommending a notice posting remedy.

As such, General Counsel's Exception #8 should be denied.

POINT VII (GC EXCEPTION #9-12)

JUDGE GREEN CONSIDERED ALL RELEVANT EVIDENCE, AND MADE FINDINGS WHICH WERE SUPPORTED BY THE RECORD

General Counsel asserts that Judge Green erred in determining that, at the bargaining session held on June 26, 2014, Company President Dave Kloeber raised several critical questions regarding union security and dues check-off that went unanswered by the Union. General Counsel argues that Respondent's account of events was a "post hoc fabrication, developed for presentation

at trial," and that Judge Green erred in crediting Respondent's testimony as to this issue. (G.C. Brief at p. 23.) This argument fails for a multitude of reasons.

First, as General Counsel readily acknowledges, the witnesses for the Union and the Company presented two different accounts regarding the bargaining sessions held on May 1, 2014, and June 26, 2014. Indeed, General Counsel admits that "Judge Green, in receipt of the two conflicting accounts, had to determine which fact pattern to credit." (G.C. Brief at p. 18.) Of course, when presented with such conflicting testimony, it was entirely within the province of the administrative law judge to determine which party's account to credit. University of New Haven, 279 NLRB 294 (1986) ("This and other areas of conflicting evidence demonstrate that the case turned in part on credibility issues properly submitted to an administrative law judge for determination."); El Paso Natural Gas Co., 193 NLRB 333, 343 (1971) ("Credibility resolutions are peculiarly within the province of the Trial Examiner.") Here, Judge Green properly credited the testimony of Respondent's witnesses regarding the substantive discussions held during the parties' bargaining sessions, including the specific discussions regarding union security and dues check-off. In particular, Judge Green ruled that "[i]n the present case, I think it cannot be said that Respondent did not provide reasons for refusing to accede to the proposed union security/dues checkoff provisions. ***The evidence shows that at the bargaining session held on June 26, 2014, the Company raised a number of questions about these proposals***." (ALJ Decision at p. 15; ln 33-36.) (emphasis added).[6]

This ruling is supported by the evidence presented in this case. It is undisputed that at the June 26, 2014 meeting, the parties met and bargained. (Tr. at pp. 662; 719.) The evidence

[6] It is also undisputed that, in addition to the specific concerns raised by Kloeber at the June 26, 2014 meeting, Mr. Weinberger repeatedly communicated the Company's position that the language proposed by the Union, which contained mandatory contributions to a Political Action Committee ("PAC") might be unlawful under New York State law. (Tr. at p. 722.)

demonstrates that when Mr. Gonzalvo began discussing his proposal, the representatives got into a discussion as to exactly what union security was. (Tr. at p. 720.) As the parties began to discuss the language proposed by Local 338 in its June 17, 2014 contract proposal, Mr. Weinberger explained to Mr. Kloeber the obligations and consequences of a union security clause. (Tr. at p. 720.) Mr. Kloeber then raised a multitude of concerns he had regarding union security and dues check-off. (Tr. at pp. 662; 720-21.) Indeed, Mr. Kloeber raised ***seven*** specific questions and concerns regarding union security:

1. The Company's liability should it be required to terminate an employee. (Tr. at p. 663.)

2. The process by which deductions were taken out of employees' paychecks. (Tr. at p. 665.)

3. Whether deductions from employee paychecks were made if an employee only worked one day, or a small portion of a month. (Tr. at p. 663; 721.)

4. The prospect of taking money from an employee that resulted in the employee earning less than minimum wage. (Tr. at pp. 663-64; 721.)

5. Whether deductions from employee paychecks were made if an employee took an extended leave of absence, and if so, how and when the company would be required to pay the dues. (Tr. at p. 666.)

6. If an employee was on Worker's Compensation, how the company would obtain the money from Worker's Compensation to give to the union. (Tr. at pp. 664, 695; 721.)

7. Whether taxes were taken out of employee paychecks before, or after union dues were deducted. (Tr. at p. 671.)

In response to Mr. Kloeber's questions, Mr. Gonzalvo said "they are all great questions, Dave, and I'll get back to you." (Tr. at p. 667.) Significantly, to date, as Judge Green noted in his decision, neither Mr. Gonzalvo, nor anyone else from the Union has ever gotten back to Kloeber or the Company with answers to his questions. (Tr. at p. 668; ALJ Decision at p. 4; ln 1-2.)

General Counsel's proposition that this discussion about the mechanics of union security simply never occurred is ridiculous. Initially, it should be noted that because Judge Green explicitly states in his decision that he based his factual findings on witness demeanor, his conclusions regarding what actually occurred at the June 26 meeting should be given substantial deference. See Triple A Machine Shop, 235 NLRB 208, 209 (1975) ("the Board is particularly loathe to reverse a Hearing Officer's credibility findings when witness demeanor has been a factor in the evaluation of conflicting testimony.")

Further, Respondent's witnesses did not testify in some vague or conclusory fashion. Rather, Kloeber and Weinberger testified credibly, in detail, as to the very specific concerns that were discussed at the June 26 meeting. See Precoat Metals, 341 NLRB 1137, 1190 (2004) (crediting testimony that was "specific and detailed."); In re Orland Park Motors Cars, Inc., 333 NLRB 1017, 1035 (2001) ("it is settled that general or 'blanket' denials by witnesses are insufficient to refute specific and detailed testimony by the opposing sides' witnesses.") (internal citations omitted). General Counsel attempts to discredit Kloeber and Weinberger's testimony as being "self-serving." To that end, it should be noted that Gonzalvo's testimony in favor of the Union is equally "self-serving." Indeed, if the Board was required to disregard all "self-serving" testimony, as General Counsel appears to suggest, no party would ever be afforded the evidentiary benefit of his or her own testimony at trial.

Moreover, the June 26, 2014 session was not only attended by Kloeber, Wienberger, and Gonzalvo. Union Representative Jack Caffey, and Union Organizer Yomaira Franqui were also present on June 26. (Tr. at pp. 625-626; 720.) If General Counsel wanted to discredit Respondent's account of the meeting, it had every opportunity to present the testimony of Mr. Caffey. It chose not to do so. Ms. Franqui actually ***did*** testify on behalf of the Union at the hearing. However,

incredibly, General Counsel did not ask Ms. Franqui any questions regarding her observation of the June 26 meeting.[7] General Counsel's failure to present the testimony of Union representatives Caffey and Franqui with respect to this crucial meeting should not be lost on the Board. See Jackson Hospital Corp., 355 NLRB No. 129, slip op 19 (2010) ("it is within an administrative law judge's discretion to draw an adverse inference based on a party's failure to produce a witness who may reasonably be assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when that witness is the party's agent and thus within its authority or control."); Casa San Miguel, Inc., 320 NLRB 534, 568 (1995) ("also relevant in evaluating the testimony of [witness] is the absence of corroboration for certain portions of her testimony, when corroboration was readily available.") Honda of Mineola, 233 NLRB 81, 82 (1977) (noting the "absence of corroboration" in determining witness credibility where company failed to produce any witnesses to corroborate testimony.) General Counsel had the chance to challenge the credibility of Respondent's witnesses at the hearing. It had every opportunity to call ***two*** witnesses to support Gonzalvo's testimony, and discredit the Company's account of events. General Counsel's decision not to do so cannot now be remedied on appeal, when credibility determinations have been properly resolved by the administrative law judge who presided over the hearing.

In addition, the sequence and timeline of events in this case demonstrates that Judge Green was correct to credit Respondent's version of events. It is undisputed that the ***first*** contract proposal submitted by Local 338 was on June 17, 2014. (Tr. at p. 563-44; 624.) It is further undisputed that the contract proposal sent on June 17 was the first time the Union sent the

[7] Ms. Franqui testified as to the alleged "surveillance" the Company purportedly engaged in during the August 2014 election. In his decision, Judge Green dismissed all claims relating to alleged improper surveillance. General Counsel is not challenging that portion of Judge Green's decision, and thus concedes that no such surveillance took place.

Company revised language regarding Article 3, which contained provisions regarding union security and dues check-off. (Tr. at p. 624; 630; 651.) Common sense dictates that a substantive discussion regarding union security and dues checkoff would have taken place at the first bargaining session held after the Union submitted its proposed language regarding both topics. The first bargaining session held after the Union proposed language on Article 3 was June 26, 2014. (Tr. at pp. 630, 651.) There was no substantive discussion prior to June 26 because without the Union's revised language on Article 3, there was simply no need to have such a discussion.

General Counsel asserts that Respondent's testimony that Kloeber first raised questions regarding the mechanics of union security on June 26 "is simply not believable" given that the Company had been bargaining with the RWDSU for "nearly a year," and because the RWDSU had addressed Weinberger's legality concern in October 2013. (G.C. Brief at p. 22.) First, it must be noted that between December 2013 and May 2014, there were no bargaining sessions held. Therefore, General Counsel's statement that Mr. Kloeber had been engaged in bargaining for "nearly a year," is misleading. In addition, after the RWDSU revised its proposal regarding union security in October 2013, the Company and the RWDSU had only ***one*** bargaining session prior to Local 338 assuming representational status, and at that single meeting, union security was barely discussed at all. (Tr. at p. 709). Rather, as Mr. Weinberger testified, "the major part of that meeting was whether you want to call it ACA or Obamacare. That was a very substantial part of what we were negotiating at the end of 2013." (Tr. at pp. 709-10.) As such, "very little was discussed," regarding union security. (Tr. at p. 710.) Likewise, Mr. Kloeber testified as follows:

> Q: So there were – in the several meetings that you attended with the RWDSU International there were additional discussions of union security besides the comment that their clause might be illegal, correct?
>
> A: I'm sure there was. I'm not going to tell you how, or what, or why.

Q: So did you raise your numerous concerns about union security during those discussions?

A: No, because it was illegal.

Q: And you don't recall the lawyers for the company and the union, the International RWDSU discussing whether, even after this modification, the clause was still illegal?

A: No, I don't know any of the discussions after this about it. Those meetings there was a lot of yelling. There wasn't a lot of talking.

(Tr. at pp. 680-81.) Of course, Mr. Kloeber, who is not a lawyer, cannot reasonably be expected to know what union security and dues check-off is, especially if his attorney has taken the position that the clause proposed by the RWDSU was illegal. Indeed, Kloeber testified "the only thing I remember was Stuart telling them that what they were proposing was illegal." (Tr. at p. 655.) When asked on cross examination whether he knew why Mr. Weinberger believed the RWDSU's prior proposal was illegal, Kloeber credibly testified "I don't know that part. I just know that he said it was illegal. When the attorneys sit and argue I tend to stay out of that argument." (Tr. at p. 678). Thus, under the circumstances, the fact that Mr. Kloeber did not have a thorough understanding of exactly what union security and dues check-off was prior to the June 26, 2014 meeting was entirely reasonable and therefore "believable," especially given that Gonzalvo had made clear at the May 1 meeting that Local 338 would provide its own language and provision. (Tr. at pp. 608; 623; 657; 714.)[8]

General Counsel further argues that it is "not believable" that the Union would not respond to the questions Kloeber raised at the June 26 meeting, had he truly raised them. (G.C. Brief at p. 23.) Yet, Mr. Gonzalvo testified that at the May 1 meeting, Kloeber raised questions regarding the

[8] General Counsel's argument that the language in Article 3 proposed in the June 17 agreement was "identical" to the language proposed by the RWDSU is clearly false. Mr. Gonzalvo acknowledged that Local 338 inserted an entirely new paragraph regarding mandatory contributions to a Political Action Committee ("PAC") and revised the time within which employees were required to join the union, from 31 days to 90 days. (Tr. at p. 624.)

mechanics of union security, and Gonzalvo readily admitted that he did not provide an answer. (Tr. at pp. 557-58; 612-13.) Rather, according to Gonzalvo, he responded by stating that he would submit a proposal. (Tr. at pp. 614-15.) It can hardly be argued that the Union's June 17 proposal in any way addresses the concern that Gonzalvo stated that Kloeber raised at the May 1 meeting. By revising the security clause trigger point from 31 days to 90 days, the Union did nothing to address Kloeber's concern regarding what was to happen if an employee only worked a few weeks out of a month. Moreover, Gonzalvo admitted that he never even communicated the concern that Kloeber raised regarding union security to the Union's counsel, William Anspach. (Tr. at p. 650.) Thus, even if Gonzalvo's testimony was credited over the Respondent's witnesses (which it should not be), the evidence still shows that the Union had knowledge of at least one concern that Kloeber raised, and never addressed, or even responded to it. It is therefore quite "conceivable" that the Union did not address the remaining six concerns that Kloeber raised at the June 26 session, especially given Gonzalvo's testimony, wherein he admitted that he did not know if he even told Mr. Anspach about what Kloeber and Weinberger said at the June 26 meeting. (Tr. at pp. 648-49.)

General Counsel also contends that Weinberger's failure to document the June 26 discussion regarding union security and dues check-off proves that the discussion never occurred. This argument fails. First, Mr. Weinberger truthfully testified that he cannot write down everything that is said at a meeting. (Tr. at p. 755.) Indeed, Weinberger took less than three pages of notes at a meeting that likely lasted for several hours. (Brief Ex. W.) And, while he acknowledged that he did not write down the concerns that Kloeber raised at the meeting, this does not, as General Counsel asserts, somehow prove that Kloeber never actually them. See Chicago Tribune Co., 318 NLRB 920, 940 (1995) (determining that union representatives made statements at a meeting based on "credible testimony," despite the statements not appearing in bargaining notes.); Prentice-

Hall, Inc., 290 NLRB 646, 668 (1988) (crediting the testimony of witness that an interchange occurred at bargaining session, despite it not appearing the bargaining notes.)

In addition, while General Counsel further points out that Kloeber's concerns were not contained in Gonzalvo's "notes" from the June 26 meeting, Respondent hereby submits that Gonzalvo did not even provide his true bargaining notes from that session.[9] Mr. Gonzalvo admitted that, at times, he wrote down bargaining notes on a legal pad. (Tr. at pp. 594-95.) Both Kloeber and Weinberger testified that Gonzalvo took "detailed notes" at the June 26 meeting, and according to Kloeber, Gonzalvo took said on a legal pad. (Tr. at pp. 661; 726.) Yet Gonzalvo testified that the only notes he had from the June 26 meeting was a copy of the collective bargaining agreement itself, which contains virtually no substantive whatsoever. (Brief Ex. V.)[10] Moreover, Gonzalvo's notes from the May 1 meeting, which he acknowledged were on a legal pad, do not reflect the concerns raised that Gonzalvo testified Kloeber raised regarding union security and dues check-off. [11] (Tr. at p. 633.) Of course, his failure to document this discussion does not prove that said discussion never occurred, as Gonzalvo himself testified that Kloeber raised said concerns at the May 1 session. Like Weinberger, he simply failed to write them down as they were being discussed. Thus, the fact that Kloeber's concerns from the June 26 meeting are not contained in the bargaining session notes is a red herring. The evidence in the record shows that such concerns were, in fact, raised, as demonstrated by the credible testimony presented at the hearing.

[9] Mr. Gonzalvo acknowledged at the hearing that he received a subpoena requesting all bargaining notes from the June 26 meeting. (Tr. at p. 595.)

[10] General Counsel also failed to introduce the bargaining notes of Mr. Caffey and Ms. Franqui, who both attended and participated in the June 26 meeting, and therefore witnessed the discussion that took place.

[11] Mr. Gonzalvo also took notes on a legal pad at the parties July 9, 2014 bargaining session. (Tr. at p. 725; 795.) Thus, the June 26 meeting, at least according to Gonzalvo, was the ***only*** bargaining session he attended in which he did not take notes on a legal pad.

General Counsel also points to an email exchange between Weinberger and Anspach, in which Anspach stated "I have yet to hear any reason for your client to reject [union security and dues check-off], particularly since we don't live in Alabama." (Brief Exhibit K.) Significantly, it is undisputed that Mr. Anspach did not attend the June 26 meeting. (Tr. at p. 421.) Therefore, he would only have knowledge of the litany of concerns raised by the Company regarding union security and dues check-off if Gonzalvo had told him of such. Gonzalvo, however, testified that he did not apprise Anspach of the concerns raised by Kloeber, and that he was unsure if he even told him about what the parties discussed at the June 26 meeting. (Tr. at pp. 649-50.) Clearly, the Company should not be faulted for the evident lack of communication between the Union's representatives and their attorney. Further, on July 29, 2014, Mr. Weinberger emailed Mr. Anspach and stated "there are issues with union security and dues check-off." (Brief Ex. J). At the hearing, Mr. Anspach admitted that he never even asked Weinberger what "issues" he was referring to. (Tr. at p. 458.) In particular, Anspach testified as follows:

> Q: And, my question is not whether he didn't give you a reason or whether or you asked him what his reason was for being concerned about checking off dues.
>
> A: I didn't expressly say what your – what are your issues, correct.
>
> Q: Okay. And you never asked him specifically, what are your issues – what issues do you have with agreeing to union security, did you?
>
> A: ***No. I never asked him expressly. No.***

(Tr. at p. 458.) (emphasis added). Thus, the fact that Mr. Weinberger did not reiterate each and every concern raised at the June 26 meeting in subsequent emails to Anspach is irrelevant, given that Anspach, admittedly, never asked him what "issues' he was referring to. Weinberger's decision not to re-list every concern raised by Kloeber at the June 26 meeting does not, as General Counsel contends, mean that Kloeber never raised them in the first place.

Finally, General Counsel points to Respondent's letter to the Regional Director, as purported evidence that the June 26 discussion never occurred. Mr. Weinberger's letter, however, explicitly states "it is simply false to claim that the Company never discussed why it did not want to have the union security clause and dues check-off." (Brief Ex. X at pp. 2-3.) In his letter, Mr. Weinberger re-iterated that he had informed Mr. Anspach that the language proposed by the Union regarding mandatory contributions to a PAC was unlawful under New York State law. (Brief Ex. X at p. 3.) Additionally, in the letter, Mr. Weinberger referenced a July 30, 2014 email that he wrote to Anspach, in which he wrote "I think the Union is aware that many employers do not wish to get involved in the check-off of dues for many reasons, ***including, but not limited to***, that they do not want to be responsible for checking-off dues and the issues that arise with checking off the dues." (Brief Ex. X; Brief Ex. M) (emphasis added). Notably, by stating "including, but not limited to," Mr. Weinberger made clear that he was not providing an exhaustive list of every single reason why the Company was opposed to the Union's proposal. Indeed, in the letter, Mr. Weinberger noted that Anspach himself may not have been apprised of the Company's multiple concerns because "***he was only present at one negotiation***." (Brief Ex. X; at p.3) (emphasis added.) Thus, the plain language of Mr. Weinberger's letter illustrates the obvious: Anspach had not been made aware of all of the reasons recited by Kloeber at the June 26 meeting because he was not present at the meeting when those concerns were raised. This letter reinforces the fact that the Company did raise a multitude of concerns regarding union security and dues check-off at the June 26 meeting. Finally, Weinberger made clear to Anspach in his July 30 email that "the Company is willing to bargain with the Union and discuss these provisions." (Brief Ex. M.) Thus, any contention that the Company outright "refused" to discuss its opposition to the union security and

dues check-off provisions proposed by the Union, or the reasons for its position, is completely contradicted by the evidence in the record.

It is General Counsel's burden to demonstrate that Judge Green's determination as to what occurred at the June 26 meeting was clearly erroneous, and not supported by the evidence. For the reasons stated, General Counsel has utterly failed in this endeavor.

As such, Exceptions #9-12 must be dismissed.

POINT VIII (GC EXCEPTION #13)

JUDGE GREEN'S FINDING THAT A 24 CENT RAISE WAS AGREED TO BY THE PARTIES WAS A HARMLESS ERROR THAT RESULTED IN NO PREJUDICE TO EITHER PARTY

The evidence in the record shows that in the first contract proposed by the Union, the wage increases proposed were $1.00 per hour for each of the first three years of the contract. (Tr. at p. 625; Brief Ex. B.). In its July 9, 2014 proposal, the Union modified its wage increase proposal to $0.75 per hour for the first year, and $0.25 for subsequent years. (Brief Ex. C.) In its July 17, 2014 proposal, the Union revised its wage proposal to $0.50 per hour for the first year. (Brief Ex. D.)

Thus, Respondent concedes that Judge Green incorrectly noted in his decision that the parties had reached an agreement for a $0.24 raise per hour as of June 26, 2014. This error, however, is harmless, as it caused no prejudice to either party. General Counsel asserts that "Judge Green seemingly relied on the gravity of the outcome of his calculations – a loss in pay – to support his conclusion that Respondent must therefore have voiced a concern on June 26 about the effect of union dues on minimum wage employees." (G.C. Brief at pp. 24-25.) This statement, however, is purely speculative, as Judge Green does not state anywhere in his decision what General Counsel is surmising. Judge Green based his determination that Kloeber raised a number of questions at the June 26 meeting because the evidence in the record, including the specific, detailed, and

credible testimony of two witnesses, demonstrates that Kloeber raised a number of questions at the June 26 meeting. He simply noted, albeit erroneously, that the parties had reached an agreement as to a $0.24 per hour wage increase as of that date. However, whether or not the parties were in agreement as to a particular wage increase as of the June 26 meeting is completely irrelevant. Rather, the critical inquiry is: (1) whether the Company raised its concerns regarding union security and dues-checkoff; and (2) whether the Union ever responded to said concerns. Judge Green, relying on the entire record, properly ruled that the Company did raise a litany of legitimate concerns, and that the Union failed to ever address those concerns. (ALJ Decision at p. 3; ln 30-38; p. 4; ln 1-2.) Judge Green's error, therefore, was of little consequence, and caused no prejudice. As such, the decision should be affirmed despite the harmless error. See In re Newburg Eggs, Inc., 357 NLRB No. 171 fn. 3 (2011) (affirming order despite noting the administrative judge's ruling as to a witness affidavit, "although in error, was harmless error."); Shogun Restaurant, 273 NLRB 755, fn. 1 (1984) (affirming order despite four errors made by administrative law judge); Spencer Foods, 268 NLRB 1483, fn. 1 (1983) (affirming order despite errors in judge's decision, noting that none "materially affect his findings or analysis."); IATSE, Local 7, 254 NLRB 1139, fn. 2 (1981) (affirming order, while noting three errors in administrative law judge's decision); Ployflex M Co., 258 NLRB 806, fn. 5 (1981) (affirming order, where judge's "incorrect characterization of a portion of [witness's] testimony was harmless error.")

General Counsel's Exception #13 should therefore be dismissed.

POINT IX (GC EXCEPTION #14)

JUDGE GREEN CORRECTLY RULED THAT BOARD LAW DOES NOT REQUIRE A PARTY TO OFFER A REASON FOR ITS OPPOSITION TO A PROPOSAL

General Counsel contends that Judge Green erred when he noted in his decision, "I know of no other type of mandatory subject contract proposal that would require, as a matter of law, that

the proposal's opponent justify or offer a reason for its opposition." (ALJ Decision at p. 13, ln 50-51; p. 14, ln 1.) Specifically General Counsel asserts that Judge Green's decision "reflects a misunderstanding of the meaning of bargaining in good faith, and a misreading of Board law." (G.C. Brief at p. 26.) This argument is without merit.

First, the evidence in this case shows that the Company ***did*** provide reasons that it was not agreeing to the union security provision proposed by the Union during negotiations. Respondent provided seven specific concerns regarding union security and dues check-off. The Union, when presented with these concerns, simply never addressed them. The Company need not agree to the Union's proposal when the information Kloeber reasonably sought was never provided. Any argument advanced by General Counsel suggesting that Mr. Kloeber should have simply agreed to a contract without receiving a response to his legitimate concerns regarding union security and dues check-off is ridiculous. The "reason" for the Company's denial of the Union's ultimate proposal regarding union security and dues-checkoff was that the Union had not resolved the reasonable questions and concerns raised. In addition, prior to July 28, 2014 (just three days before the Union filed the ULP Complaint), the language proposed by the Union in Article 3 of the contract included a provision which required employees to contribute to a PAC. (Exhibits). Mr. Weinberger made clear at bargaining sessions, and subsequent emails that he believed that the PAC language was unlawful under New York State law. (Tr. at p. 722; Brief Ex. E.) Therefore, the Union was well aware of the reasons why Respondent was not agreeing to its proposals.

Nevertheless, even if the Company did not provide any "official" reason for its decision to reject union security and dues check-off (which it did), Respondent did not run afoul of Section 8(a)(5) of the Act. While it is undisputed that Section 8(d) of the Act requires parties to meet and bargain collectively in good faith, "such obligation does not compel either party to agree to a

proposal or require the making of a concession." 29 U.S.C. § 158(d). Nor does Section 8(d) require, as a matter of law, that a party provide a specific reason for its denial of a particular proposal. Contrary to General Counsel's argument, such a denial is not evidence of "bad faith," even when a reason is not proffered. It is well settled that a "party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." St. George Warehouse, Inc., 341 NLRB 904, 906 (2004) (quoting Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984)); see also S & F Market Street Healthcare LLC, 2012 NLRB LEXIS 198, 64 (2012) ("just as a union does not violate the Act by aggressively pressing a demand for a union security clause, so an employer does not violate the Act simply by refusing to agree to such a demand."); NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960) (***"the employer may have either good or bad reasons, or no reason at all, for insistence on the inclusion or exclusion of a proposed contract term."***) (emphasis added). Indeed, in St. George Warehouse, Inc., 341 NLRB 904, 906 (2004), the Board ruled that the employer engaged in good faith negotiations despite the fact that the employer "failed to give reasons for rejecting certain union proposals."

The cases cited by General Counsel are easily distinguishable. In Palestine Bottling Co., 269 NLRB 639 (1984), the Board stated, "[r]espondent's failure to define, explain, or advocate its position and ***instead its attempt to force on the Union a reduction of prior working conditions are indicia of its lack of good faith***." (emphasis added). The Board did ***not***, as General Counsel suggests, rule that the employer's failure to provide a reason for rejecting a particular union proposal (as contended here) constituted bad faith. In that case, the employer insisted on providing less employee benefits, reducing vacation time and pay, and creating less favorable working conditions for its workers, without providing any justifications for said positions. Palestine

Bottling Co., 269 NLRB at 645. It was the employer's failure to provide reasons for its insistence on reducing working conditions, coupled with statements by the employer that "the Union would not be of any help to employees," which the Board found determinative of its bad faith. Id.

In Sparks Nugget, Inc., 298 NLRB 524 (1990), the Board found the employer to have acted in bad faith where the employer refused to make any concessions whatsoever from the prior collective bargaining agreement that had been in place. In that case, the Board noted that "when the Union asked the Respondent to specify its objections to the Union proposal, Respondent refused to do so, stressing simply that it wanted to return to the 1972-1975 contract." Id. at 527. Thus, in Sparks Nugget, Inc., the employer essentially refused to bargain ***at all***, and simply insisted that the union agree to a renewal of the prior contract. The same cannot be said here, where the Company made several concessions throughout the bargaining process, and repeatedly expressed a willingness to meet, discuss, and bargain all issues, including union security and dues check-off.

Lastly, General Counsel cites Irontiger Logistics, Inc., 359 NLRB No. 13 (2012), which is completely irrelevant. In that case, the union alleged that the employer was not complying with its collective bargaining agreement, and requested information from the company concerning bargaining unit employees. In particular, the union's "request related to unit employees' assigned loads and thus sought information that was presumptively relevant to the Union's ability to represent those employees." Id. at *3. The Board ruled that the information was relevant, and the employer's failure to provide was an indication of bad faith. The circumstances in Irontiger Logistics are thus completely inapplicable here, as it did not even involve negotiation of a contract, or the bargaining process.

Thus, while the evidence shows that Respondent did provide reasons for rejecting the Union's proposal, it is clear that even if it had failed to do so, Respondent would not have violated the Act.

General Counsel's Exception #14 should therefore be denied.

POINT X (GC EXCEPTION #15)

JUDGE GREEN CORRECTLY DETERMINED THAT THE COMPANY BARGAINED IN GOOD FAITH

General Counsel asserts that Judge Green erred in ruling that the Company bargained in good faith throughout the negotiation process. Because the evidence in the record clearly supports Judge Green's conclusion, General Counsel's exception must be rejected.

It is well settled that, in interpreting the "good faith" standard in the course of collective bargaining, the Board will examine the totality of a party's conduct during bargaining, both at and away from the table." S & F Market Street Healthcare LLC, 2012 NLRB LEXIS 198, at *44 (2012). Board law makes clear that "adamancy with respect to a position in collective bargaining does not by itself constitute a failure to bargain in good faith." Accurate Die Casting Co., 292 NLRB 292, 298 (1989). Rather, "party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." St. George Warehouse, Inc., 341 NLRB 904, 906 (2004)

Significantly, here, while the Company rejected the union security and dues check-off provisions proposed by the Union, it did not in any way indicate that its rejection of the clause was due to "philosophical grounds." In fact, Gonzalvo and Anspach both testified that the Company did not ever state that Respondent would never agree to a contract that included union security or dues check-off. (Tr. at pp. 425-26; 455; 622; 630; 637.) A telephone conversation was held on July 24, 2014, in which Mr. Anspach told Mr. Weinberger that the Union wanted to include the

language on union security and dues check-off that the Union had previously proposed. (Tr. at p. 728.) Mr. Weinberger told Mr. Anspach and Mr. Gonzalvo that he would "speak to Dave" regarding the union security and dues check-off, thus further indicating a willingness to bargain over the issue. (Tr. at 434; 645; 728.)

Over the next ten days, in subsequent e-mails, Mr. Weinberger repeatedly stated that the Company was willing to meet and discuss union security and dues check-off. Specifically, Mr. Weinberger re-iterated the company's willingness to bargain those issues in no less than ***six*** written correspondence: (1) July 25, 2014; (2) July 28, 2014; (3) July 30, 2014; (4) August 1, 2014; (5) August 3, 2014; and (6) August 4, 2014. (Brief Exs. F; K; L; P; R; S.) Significantly, Mr. Anspach admitted that the Union filed the ULP Complaint ***despite*** Mr. Weinberger repeatedly expressing a willingness to meet with the Union to try to resolve union security and dues check-off. (Tr. at p. 471.) Thus, the record is devoid of any evidence whatsoever that would suggest that the Company was not ready to consider any form of union security, or that it was categorically opposed to the inclusion of union security on philosophical grounds. The Company simply did not agree to the union security provision that was proposed by the Union ***at that time***.

The facts in APT Medical Transportation, 333 NLRB 760, 770 (2001) are almost identical to the case at bar. In that case, like here, the employer was opposed to the union security clause that was proposed by the union. Indeed, in that case, like here, when asked about whether the company was willing agree to union security, the company's bargaining representative stated "we are not prepared to change our position ***at this time.***" Id. (emphasis in original). In APT Medical Transportation, the Board ruled that there was no bad faith bargaining, finding that "it is not at all clear from the evidence that Respondents would not consider any form of union security." Id. Similarly, here, the Company repeatedly expressed a willingness to meet, confer, and consider

union security and dues check-off. In fact, on August 3, 2014, Mr. Weinberger made clear in an email to Anspach that ***"the Company has not summarily turned down these proposals."*** (Brief Ex. R.) (emphasis added).

Moreover, even if the Company had communicated a categorical refusal to accept a contract that included union security (which it did not), said position would be entirely permissible under the Act. It is well settled that an employer is not required by the Act to agree to every proposal made by a union; union security or otherwise. Indeed, the Board has repeatedly found that an employer's refusal to agree to union security does not equate to a finding of bad faith bargaining. See Rocky Mountain Hosp., 289 NLRB 1347, 1367 (1988) (employer did not engage in bad faith bargaining where company refused to even discuss union security); Challenge-Cook Bros., 288 NLRB 387, 388 (1988) (employer did not engage in bad faith bargaining where company proposed the elimination of union security as a condition of employment, despite union security appearing in the prior collective bargaining agreement, finding that "Respondent's adherence to elimination of union security was a reasonable bargaining stance."); CSC Holdings, LLC, 2014 WL6853881 (NLRB Dec. 4, 2014) (employer's refusal to include union security did not create inference of bad faith where there was no evidence that the company's refusal was based on "philosophical objections."); AMF Bowling Company, Inc., 314 NLRB 969, 974 (1994) (no bad faith where employer sought to eliminate union security, finding that there was no evidence that the company was unwilling to discuss union security.); Midwest Television, Inc., 349 NLRB 373 (2007) (employer's proposal to eliminate union security clause was not evidence of bad faith or an intent not to reach agreement.)

General Counsel goes to great lengths to point out the concessions made by the Union throughout the bargaining process. General Counsel ignores that the Company also made many

concessions along the way, including its agreeing to just cause for discharge, arbitration of disputes, and wage increases. Nevertheless, simply because the Union conceded more points than the Company throughout the negotiation process does not prove that the Company was somehow negotiating in "bad faith." As the Board has made clear, "hard bargaining is not outlawed." Accurate Die Casting Co., 292 NLRB 292, 298 (1989); Remington Lodging & Hospitality, LLC, 359 NLRB No. 95, slip op at 77 (2013) ("hard bargaining does not necessarily make bad faith bargaining.")

General Counsel's contention that the Company "never provided a reason" for its rejecting the union security and dues check-off provision proposed by the Union must be rejected, for the reasons already stated above. The Company did provide reasons, as Judge Green properly determined that "at the bargaining session held on June 26, 2014, the Company's owner raised a number of questions about these proposals." (ALJ Decision at p. 15; ln 32-35.) Nevertheless, even if the Company hadn't provided reasons, the undisputed fact that Weinberger repeatedly communicated to Anspach that Respondent was willing to meet, discuss and bargain the issue demonstrates that it was negotiating in good faith.

General Counsel's attempt to portray the Company as having "frustrating the Union's attempts to arrange a time to discuss Respondent's opposition to union security and dues check-off" is outrageous. (G.C. Brief at p. 31.) First, the General Counsel's contention that Weinberger "said he would provide his client's response to the Union's July 24 package proposal" by July 28, 2014 is simply not true. Mr. Weinberger never said that. (Tr. at p. 738.) Prior to the July 24, 2014 phone conversation, there were nine open items that the parties were in the process of negotiating, including union security. (Brief Ex. G.) On July 25, 2014, Mr. Weinberger requested that the Union put its package proposal in writing, because in the conversation, the Union's proposal wasn't 100%

clear, and he wanted to accurately convey everything to Mr. Kloeber, who had requested the Union's proposal be put into writing. (Tr. at pp. 669-70; 729; Brief Ex. F.) Clearly, it was reasonable for Mr. Weinberger to request that the contract proposal be put in writing. As a seasoned attorney and negotiator, it is reasonable to assume that Mr. Anspach would have understood the necessity of putting the terms and conditions of a contract in writing.[12] Mr. Anspach, however, testified that he believed that Mr. Weinberger's request that the proposal be put into writing was "ridiculous." (Tr. at pp. 435-36.) Nevertheless, ***three days*** passed before the Union's proposal was put into writing and expressly communicated to Mr. Weinberger, on July 28. (Brief Ex. G.) This three day delay was attributable to the Union, not the Company.

On each of the next two days – July 29, and July 30 – Mr. Weinberger contacted Anspach and re-iterated that the Company was willing to meet, confer, and bargain over union security and dues check-off. (Brief Exs. J; L.) Although Mr. Weinberger was in New Jersey negotiating a nursing home contract on July 31, he sent an e-mail to Anspach that night indicating that while he would be at meetings on Long Island and Yonkers on August 1, he would try to make himself available for a call. (Tr. at p. 742; Brief Ex. O). Mr. Weinberger stated "if you have any suggestions about arranging something for tomorrow, email them to me." (Brief Ex. O.) While the General Counsel avers that the Union made itself available "the entire day," there was no evidence in the record to demonstrate that anyone from the Union even reached out to Weinberger on August 1, 2014 to discuss the issue, or that it ever even attempted to arrange a call. Instead of attempting to bargain with Respondent, the Union chose to file the ULP charge against the Company, ***one full week*** prior to the election.

[12] Judge Green correctly agreed that it was not improper for Mr. Weinberger to request that the Union put its proposal in writing. Specifically, Judge Green wrote "But lawyers act like lawyers, and I see nothing nefarious in Weinberger's request for a written document nailing down what had been agreed to." (ALJ Decision at p. 5; ln 11-12.)

Notably, however, the Company's good faith efforts to bargain did not conclude once the ULP charge was filed by the Union. Mr. Weinberger contacted Mr. Anspach and re-affirmed the Company's willingness to bargain on August 1, August 3, and August 4, 2014. (Brief Exs. P; R; S.) On Monday, August 4, 2014, at 2:58PM, Mr. Anspach asked Mr. Weinberger when he and his client were available to confer. (Brief Ex. S.) Within 30 minutes, Mr. Weinberger responded and told Anspach "we are available to talk by phone between 4:00PM to 5:00PM." (Brief Ex. S.) Mr. Anspach responded via e-mail later that day, stating "[t]he Union's not available during that period. I will check with the Union about its availability." (Brief Ex. T.) Mr. Anspach testified that he never got back to Mr. Weinberger with the Union's availability, and that his August 4, 2014 e-mail indicating that he would "check the union's availability" was the last communication the Union had with the Company regarding contract negotiations. (Anspach Tr. at p. 479.) Mr. Anspach testified that he wasn't sure if he ever even checked with the Union regarding its availability to bargain. (Id.) Instead, Mr. Anspach "made a judgement that we were banging our head against a wall," and that "it was a lost cause." (Id. at pp. 479-480.)[13] Notably, during the week of August 4, 2014, representatives from Local 338 were unavailable to meet and bargain because they were out of town at a convention. (Tr. 479.) Of course, the Company was unaware that the Union was would be unavailable during the week of August 4. Nevertheless, the evidence in the record conclusively shows that ***it was the Union, not the Company,*** which cut off negotiations, despite Respondent's repeated offers to meet and confer.[14]

[13] Mr. Anspach utterly failed to explain how he made a "judgment" on August 4 that further negotiations would be fruitless, given that the Company agreed to meet and bargain over the issue ***that very day.***

[14] In fact, in December 2014, Mr. Weinberger again contacted Mr. Anspach and re-iterated the Company's willingness to bargain. (Tr. at p. 749). In particular, Weinberger "said to Mr. Anspach we will meet and we will discuss any issues you want to talk about, period. Unequivocally, period." (Tr. at p. 750)

General Counsel also asserts that Respondent "placed blame on the Union for lack of wage increases, even pulling employees aside to inform them that, if it was not for the presence of the Union, wage increases would have been granted every quarter." (G.C. Brief at pp. 32-33.) These alleged conversations, however, as Judge Green properly ruled in his Section 8(a)(1) determination, never occurred. Any argument that such phantom statements are suggestive of the Company's bad faith must be rejected.

The essence of the Union's contention that Respondent did not negotiate in "good faith" is that Respondent did not agree to exactly what the Union was proposing. Respondent, however, on numerous occasions made clear that it was willing to consider the Union's proposal regarding union security, and bargain over the issue. This is precisely what the Act requires. Judge Green properly determined, based on all of the evidence presented in the record, that the Company bargained in good faith.

General Counsel's Exception #15, therefore, should be dismissed.

POINT XI (GC EXCEPTION #16)

JUDGE GREEN CORRECTLY DETERMINED THAT THE COMPANY WAS NOT ATTEMPTING TO FRUSTRATE THE COLLECTIVE BARGAINING PROCESS

In Exception #16, General Counsel simply regurgitates all of the arguments previously made in its brief. For the reasons already set forth at length above, General Counsel's averments are wholly without merit.

General Counsel asserts that "none of Respondent's concerns regarding the mechanics of dues check-off should serve as a barrier to agreeing to the principle of union security and the principle of automatic dues deduction." (G.C. Brief at p. 36.) This proposition advanced by General Counsel – that Kloeber should have agreed to the "principles" of union security and dues

check-off without being fully apprised by the Union as to exactly how each mechanism would affect his business – is patently absurd. It was certainly reasonable for Mr. Kloeber to expect answers and/or explanations to his legitimate questions and concerns regarding the practical consequences of union security and dues check-off before agreeing to a contract that included union security and dues check-off. Indeed, for an employer to agree to a contract without having a full and thorough understanding of the real world effects that its terms and conditions create would defy all logic and business sense.

Further, it must be noted that the Company ***never*** expressed that it would be absolutely unwilling to consider, or accept a contract that included union security and dues check-off. In fact, when the Union finally put its "package proposal" in writing on July 28, 2014, wherein union security and dues check-off remained the last remaining "open" items, Mr. Kloeber told Mr. Weinberger "we need to get meeting …it's time for us to demand our answers." (Tr. at p. 672.) Judge Green also noted that when Weinberger communicated the Union's proposal to Respondent, Mr. Kloeber stated that they "still had not gotten answers to the issues raised at the June 26 meeting and that these should be resolved." (ALJ Decision at p. 5; ln 22-24.) And, as Judge Green correctly ruled, "the Union's representatives did not respond to Respondent's concerns." (ALJ Decision at p. 15; ln 40-41.)

Respondent, at all times remained ready, willing, and open to further bargaining.[15] General Counsel cannot escape one crucial and undisputed fact: the Union broke off negotiations with the Company despite the Company repeatedly communicating that it wanted to continue bargaining. The Union, not the Company, made a unilateral determination that future bargaining would be

[15] Notably, while General Counsel asserts that Judge Green erred by failing to recommend a remedy requiring the parties to bargain, such a remedy is precisely what Respondent has sought all along. It is the Union, not Respondent, who has refused all attempts to bargain.

"useless." Even after the ULP Complaint was filed, Mr. Weinberger, on behalf of the Company, communicated that he would be willing to meet and confer during business hours, after business hours, or even on the weekend. It was the Union, not the Company, who "frustrated" the collective bargaining process by thwarting all attempts to reach a resolution.

General Counsel's Exception #16 must therefore be denied.

POINT XII (GC EXCEPTION #17)

JUDGE GREEN CORRECTLY DETERMINED THAT NO SECTION 8(A)(5) VIOLATIONS OCCURRED, AND THEREFORE DID NOT ERR BY NOT RECOMMENDING A REMEDY

For the reasons set forth above, Judge Green properly ruled that the Company bargained in good faith, and therefore did not violate Section 8(a)(5) of the Act. Judge Green therefore did not err in failing to recommend a remedy.

General Counsel's Exception #17 must be denied.

CONCLUSION

For the foregoing reasons, General Counsel's Exceptions should be denied in their entirety, and Respondent should be granted such other relief that the Board deems just and proper.

Respectfully Submitted,

Joshua Beldner

Of Counsel To

Goldberg & Weinberger LLP
630 Third Avenue, 18th Floor
New York, NY 10017
P: (212) 867-9595

Attorneys for Respondent

Exhibit A

Neil Gonzalvo

From: stuart575@aol.com
Sent: Friday, April 25, 2014 10:08 AM
To: Neil Gonzalvo
Subject: Apogee
Attachments: Proposalsscanned42114.pdf

Dear Neil,

Attached are the proposals and counter-proposals. It does not include the RWDSU's last wage offer.

I need to talk to you about what we are doing on May 1st. I hope that all is well.

Stuart Weinberger
(212) 867-9595 (Ext. 313)

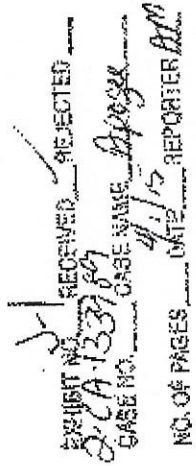

Exhibit B

Neil Gonzalvo

From: Neil Gonzalvo
Sent: Tuesday, June 17, 2014 5:17 PM
To: Stuart Weinberger
Cc: 'Jack Caffey '
Subject: Unique proposal/merged document
Attachments: L338 Unique proposal -6-17-14 neg version.docx

Hi Stuart,

Attached, for review, please find my attempt to merge agreed upon items and open items. We are close on virtually all of the language items. I included a wage proposal, similar to what we had discussed in your office two weeks ago. We still need to discuss the medical.

We would like to set up a negotiations session w/ you and our committee to go over all of the remaining items.

Let me know what you have available,

Thanks,

Neil E. Gonzalvo
Director of Contract Administration & Research
Local 338 RWDSU/UFCW
1505 Kellum Place
Mineola, NY 11501
TEL: 516-294-1338 EXT: 400 | FAX: 516-281-0253
ngonzalvo@local338.org | www.local338.org

Follow us on: www.twitter.com/local338 | www.facebook.com/local338

" Our mission is to better the lives of our members and all working people"

COLLECTIVE BARGAINING AGREEMENT

BETWEEN

LOCAL 338 RWDSU, UFCW

AND

APOGEE RETAIL, NY LLC d/b/a Unique Thrift Store

1. RECOGNITION

a) (1) Apogee Retail NY, LLC (hereafter "Employer") hereby recognizes the Retail, Wholesale, and Department Store Union (hereafter "Union") as the exclusive representative of all full-time and regular part-time line workers employed by the Employer at its facility located at 218 West 234th Street, Bronx, NY., including workers carrying out functions such as Pricer, Pusher, Hanger, Sorter, Maintenance, Pick-Up, Cleaner, Sales Associate, Cashier, Floater, and Bagger, but excluding all other employees, including office clerical employees, general managers, store managers, department managers, and guards, and professional employees and supervisors as defined in the Act.

(2) Bargaining unit work shall not be performed by other than bargaining unit employees except for owners, managers and supervisors that Employer deems necessary on a temporary basis.

Non bargaining unit employees may perform unit work for the purpose of instructing, training and assisting bargaining unit employees in the performance of their work. Non unit personnel may also perform unit work in emergencies, provided such work shall be of short duration (not to exceed three (3) consecutive days in the absence of consent of the Union which shall not be unreasonably withheld) and is not done for the purpose of reducing the size of the bargaining unit.

b) (1) Representatives of the Union shall have the right to visit the Employer's place of business at reasonable times to investigate wages, hours working conditions and grievances. Such visits, however, shall not be made at such times or in such a manner that shall interfere with the operations of the Employer's business. The Union shall notify the Employer in advance of the Union's intention to visit the Employer's place of business. The Union agent shall have only access to areas at the Employer's place of business where the bargaining unit employees are located, at times where the bargaining unit employees are at the Employer's place of business or where it is necessary to investigate the wages, hours and working conditions.

(2) The Union will be permitted to post notices or distribute literature in any area of the Employer's premises to which the public does not have access and where work is otherwise not performed.

(3) The Employer will provide bulletin board space, which shall be used ~~solely~~ for the purpose of posting authorized Union notices. ~~Said bulletin boards will be located in the stock room and break room.~~

(4) The Employer shall provide the Union with the names of all employees and their addresses, phone numbers and rates of pay within thirty (30) days after hire and every six months commencing upon the execution of the collective bargaining agreement upon request of the Union. ~~On a quarterly basis the Employer shall provide the Union with information necessary for the Union to ensure compliance with the terms of this agreement, including names of all employees (including newly hired employees), addresses, home and cell phone telephone numbers, and email addresses and employees' rates of pay and hours of work.~~

(5) The Employer and Union agree to meet as needed and is reasonable under the circumstances to administer this agreement.

~~(6) The Employer agrees to recognize the Union as the collective bargaining representative of any future bargaining unit in which the Union demonstrates a majority showing of interest in the form of signed cards. The Company agrees to abide by the certification of cards by a third party that is mutually agreeable to both parties at the time that the request for recognition letter is sent to the Company. If no mutually acceptable parties can be agreed to, the cards shall be reviewed and checked by the National Labor Relations Board.~~

2. MANAGEMENT RIGHTS/MODIFICATION

~~a) The Union shall deal with the Employer in good faith, including officers and agents selected by the Employer.~~

~~b) The Union recognizes that the Employer retains the right to exercise the customary functions of management in operating its facility, subject to the express limitations of this Agreement. The Employer may promulgate written work rules provide the rules do not violate any of the provisions of this Agreement. The Employer shall furnish the Union with a copy of any such work rules.~~

~~c) This agreement cannot be changed orally. Any changes must be in writing signed by the parties.~~

The Union recognizes the right of the Employer to establish and implement the policies of the Employer. It is recognized that the Employer retains the right to exercise the customary functions of management in operating its facility. Such rights shall include, but are not limited to, location of operation, types of equipment to be used or materials purchased or sold, and whether or to what extent any services or activities of any nature whatsoever shall be added, modified, eliminated or obtained by contract with any other company. These management rights also include the right to hire and determine the number of employees in the facility or a

department including the number assigned to any particular work, to increase or decrease the number of employees, ~~to sub-contract~~, to direct and assign work, to establish new job classifications and job content and qualifications, to determine when and where overtime shall be worked, to establish and schedule the working hours of the employees, to determine the reasonable work pace, work performance levels and standards of performance of the employees, tot require safety devices and equipment, to layoff, to discipline for just cause, to discharge for just cause, to suspend for just cause, to transfer, to promote and to take any action considered necessary to establish and maintain efficiency and discipline. The Employer may promulgate written work rules provided the rules do not violate any of the provisions of this Agreement. The Employer shall furnish the Union with a copy of such work rules.

3. UNION SECURITY

a) As a condition of continued employment, all current employees who are covered by this contract shall, within ~~thirty-one (31)~~ **ninety days (90)** of the effective date of this agreement or the date of its execution, whichever is later, become and remain members in good standing of the Union. As a condition of employment, all employees hired after the effective or execution date of this agreement, whichever is later, shall become Union members within ~~thirty-one (31)~~ **ninety days (90) days** of becoming employed and shall remain members thereof.

b) Upon receipt of a written authorization from the Union, the Employer shall, pursuant to such authorization and provided such authorization has not been revoked, deduct from the wages due each such employee each pay period a regular share of the monthly union dues/fees and shall remit to the Union each month the dues/fees collected, together with a list of all employees for whom dues/fees are being remitted and an indication of the amount being remitted for each.

The Employer agrees to deduct and transmit to the Treasurer of RWDSU Local 338 PAC the amount specified for each hour worked from the wages of those employees who voluntarily authorize such contributions on the forms provided for that purpose by RWDSU Local 338 PAC. These transmittals shall occur monthly and shall be accompanied by a list of the names of those employees for whom such deductions have been made and the amount deducted for each such employee.

c) The Company may give notice to the Union of job openings, but the Company retains the right to use whatever sources it deems appropriate to obtain new hires and the Company's right to hire an employee shall be in the Company's sole discretion.

4. EMPLOYMENT/PROBATIONARY PERIOD

a) The Employer shall be the sole judge as to the qualifications of any applicant for employment.

b) All new employees hired by the Employer shall be subject to a probationary period of 90 days (excluding three or more continuous absences). All such probationary employees may be disciplined or discharged by the Employer during such probationary period without recourse by the Union or the employee and such discipline or discharge shall not be subject to the grievance and arbitration procedure contained herein. Probationary employees shall not be entitled to any of the benefits including, but not limited to, paid time off, provided in this Agreement until completion of the probationary period.

5. HOURS OF WORK/OVERTIME

a) (1) All hours actually worked in excess of forty (40) hours in one week shall be paid at the rate of one and one-half times the employee's regular straight-time hourly wage. All overtime must be authorized in advance by the Employer.

(2) Assignment of overtime work shall be in the discretion of the Employer, and the Employer may require any employee to work overtime on a reverse seniority basis. However, prior to mandatory overtime, the Employer shall offer overtime on a voluntary basis to qualified employees by seniority.

b) There shall be no pyramiding of overtime pay.

c) Schedules shall be posted at least two weeks in advance and shall list the employee by name. No employee shall be required to work a schedule where they work on more than six days out of the week. Schedules once posted shall remain in effect and shall not be changed without the consent of the employee, **unless there is an emergency**.

d) Full time employees are defined as those regularly scheduled to work forty (40) or more hours in a week. The Employer may during its busy seasons (Easter, summer months, back-to-school and Christmas) temporarily increase the hours of part time employees, if the employee consents. Part time employees shall be entitled to all of the benefits provided in this Agreement.

~~f) Full time employees must constitute a minimum of 80% percent of the bargaining unit's work force. Employees with full time status shall not be reclassified to part time unless the employee consents.~~

g) All employees scheduled to work more than five (5) hours in a day shall be required to take a mandatory thirty (30) minute unpaid lunch or dinner break to begin no earlier than 2 hours after starting work and end no later than 2 hours before the end of the work day. There are no split shifts.

h) Any employee scheduled for 7 or more hours of work in a day shall be granted one half hour paid lunch or dinner break to begin no earlier than 3 hours after starting work or ending no later than 3 hours before the end of the work day. Employees shall have two 10 minute paid breaks not to be taken any closer than two hours before or after the lunch/dinner break. With the

consent of the employee the break may be taken together in conjunction with the meal period. Employee shall not be permitted to work through their breaks.

i) Employees shall be permitted to leave the premises of the employer on their meal period or break, provided that they return on time.

~~ii) Schedules shall be posted no later than one week in advance, and shall list employees by name. Employees who do not work on Saturday or Sunday will be provided with a telephone number to contact a manager to find out their schedule for the coming week. Schedules shall not be changed without workers' written consent.~~

6. TRANSFERS

There shall be no transfer of any employee to another store. However, if an employee wishes to transfer to another store, the Employer may transfer the employee to that store, as long as the employee submits their request in writing and written notice is given to the Union. .

7. WAGES –

(a) All employees shall receive the following raises as follows:

Effective upon Ratification - $1.00 per hour (employees who have completed their trial period)

Effective one year after Ratification - $1.00 per hour (employees who have been employed for at least a year)

Effective two years after Ratification - $1.00 per hour (employees who have been employer for at least a year)

(b) Any employee who is on an approved leave of absence on the date of any of the wage increases above shall receive the increase upon return to their employment.

(c) Upon completion of their probationary period, the regular hourly rate for all employees shall be increased by thirty five ($0.35) cents per hour.

(d) The Company shall maintain its current payment schedule and method unless it notifies the Union of a change.

(e) All appropriate statutory deductions shall be made from payroll checks issued to employees. The Employer shall cover all employees in accordance with the law for disability insurance, unemployment insurance and workers compensation.

8. CHILD LABOR - withdraw Union Proposal

None of the Employer's work may be performed in violation of child labor laws.

9. SENIORITY

a) Seniority shall be measured for purpose of layoff and recall by date of hire. Should layoffs become necessary, layoffs and recall shall be made on the basis of seniority. All employees laid off shall have recall rights for up to six (6) months and the Employer shall not hire new employees before recalling laid off employees who have the right to recall. An employee's failure to respond or return from recall within five (5) days of confirmed receipt of a recall later (as established by use of certified mail) shall terminate the employee's recall rights. All correspondence referenced in this paragraph shall be copied to the Union.

b) At least two weeks before any layoff is implemented the Employer shall notify the union in writing of the date of the layoff, the identity of the employee to be laid off ~~and any offers of other employment conveyed to the employee to avoid a layoff as well as the amount of severance to be paid~~.

10. DISCIPLINE/DISCHARGE

a) No employee covered by this agreement shall be disciplined, suspended or discharged except for just cause. The Employer shall endeavor to give the Union 24 hours advance notice of a suspension or discharge and in every event must give the Union notice within 24 hours after issuing a suspension or discharge.

11. GRIEVANCE AND ARBITRATION

a) A grievance shall be defined as any dispute between the Union and the Employer arising out of the interpretation or application of this Agreement, other than matters referred to in this Agreement as excluded from or limited under the provisions of this Article. A grievance shall be disposed of as follows:

Step 1. Within ten calendar days of the occurrence (or when the Union or affected employee(s) reasonably should have known of the occurrence) giving rise to the grievance, the aggrieved employee, shop steward or Union representative shall discuss the matter with the employee's immediate supervisor, who shall, if authorized, attempt to provide a satisfactory resolution of the matter.

Step 2. Unless a satisfactory resolution is reached at Step 1, the grievance may, within ten calendar days of the Step 1 meeting or, if later, the employer's response to the grievance, be submitted to the Employer's designee (identified to the Union in advance) in a writing signed by the Union, which shall set forth a statement of the facts and provisions of this Agreement upon

which the grievance is based and upon which the Union relies in support of the grievance. The Employer shall reply in writing to the grievance within ten calendar days after receipt thereof.

Step 3. If no satisfactory resolution of the grievance has been reached in Step 2, either party to this Agreement may, within fifteen (15) calendar days after the Employer's reply under Step 2, submit a demand for arbitration to the other party with a copy of such demand to the Impartial Arbitrator, Roger Maher. In the event Roger Maher is unable or unwilling to serve on a particular matter, Robert Herzog shall be designated as Impartial Arbitrator for that matter.

b) Any grievance filed by the Employer shall be initiated, in writing, to the Union. The parties shall then endeavor to resolve the grievance through meeting and/or discussion of the issues raised in the grievance. In the event the parties are unable to satisfactorily resolve the grievance, the Employer may submit a demand for arbitration to the other party with a copy of such demand to the Impartial Arbitrator, Roger Maher.

c) The decision of the Arbitrator shall be final and binding upon the parties. The Arbitrator shall have no power to add to, subtract from, or otherwise modify this Agreement.

d) A grievance by the Employer, a grievance concerning a discharge or discipline of an employee, or grievances which are matters of general concern or which apply to all employees, may be instituted by either of the parties to this Agreement directly at Step 2.

e) The Employer's failure to reply to a grievance shall not be deemed acquiescence thereto or as a bar to arbitration of such grievance, and the Union may proceed to the next step.

f) In the event of the Employer's failure to timely provide notice to the Union of a discharge or other discipline as set forth in Article 9, paragraph (a) above, the grievance must be instituted within ten calendar days of the Union's receipt of such notice.

g) Discharges or other disciplinary actions taken against any employee during the employee's probationary period shall not be subject to the grievance and arbitration procedure and shall in all respects be without recourse by the Union.

h) The Union may designate one or more shop stewards. The steward shall be allowed to investigate or take a grievance while on paid time provided that the doing so shall not interfere with the employer's operations. Stewards shall not be considered agents of the Union for any purpose and shall not have the power or authority to bind the Union or to reach agreements with the Employer at variance with the specific terms and conditions of this Agreement. **(Open - The employer will propose other language)**

12. NO STRIKES/NO LOCKOUTS

a) The Union agrees that during the term of this Agreement neither it nor any employee(s) covered by this Agreement will cause, sanction, encourage or engage in any strike, walkout or sympathy strike at the employer's premises.

b) During the term of this Agreement the Employer shall not engage in a lockout.

(Open to discussion)

13. JURY DUTY

An employee summoned to jury duty shall immediately inform and provide a copy of the summons to the Employer. In such event, the employee shall be given an unpaid leave of absence to attend to jury duty.

14. LEAVES OF ABSENCE

a) The Employer may grant leaves of absence, in writing, to employees desiring them not to exceed ninety (90) days. The Employer may extend the leave based on an individual's circumstances. Such leaves shall be without pay. Seniority shall not be broken provided the employee timely returns from the leave. ~~During any such temporary leave, the Employer may replace the employee with a temporary new hire. Such temporary employee shall be covered by this contract, except that his/her termination shall not be subject to the grievance and arbitration procedures contained herein. Any employee hired as a temporary employee under this Section shall be informed in writing (with a copy to the Union) of his/her temporary status at the time of hire.~~

~~b) Before hiring a temporary employee the Employer shall notify the Union in writing of its intention to do so and the duration of the employment and the name of the employee on leave. Also a copy of the leave of absence shall be provided the Union. Any temporary employee, who continues to be employed beyond his original term of hire, shall be covered by all the terms of this Agreement except that he does not have to complete a probationary period of employment provided that he/she has been employed for more than 60 days as a temporary.~~

c) The employer shall give FMLA leave as required by law.

15. UNIFORMS

Employees shall not be required to pay for uniforms required by the Employer to be worn on the job. The Employer will provide employees with new uniforms two times a year, and will provide one replacement uniform per year in the case that a uniform is lost, stolen or ruined.

16. EQUAL RIGHTS

There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, sexual orientation, union membership, or any

characteristic protected by law, ~~including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the American Disabilities Act, the Age Discrimination in Employment Act, 42 U.S.C. 1981, the Family and Medical Leave Act, the New York State Executive, the New York City Administrative Code or any other similar laws, rules and regulations. All such claims shall be subject to the grievance and arbitration procedure as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.~~

The Employer shall not discriminate against any present or future employee or applicant for employment by reason of race, creed, color, age, disability, national origin, sex, sexual orientation, union membership, marital or parental status, gender identity or expression, pregnancy or any other characteristic protected by local, state or federal law.

The foregoing shall not prohibit or limit in any way the obligation of the employer under law to accommodate an employee's needs to participate in religious observances and/or the Sabbath.

17. HEALTH AND SAFETY

a) The Employer shall have clean and functioning rest rooms for use by the employees; proper ladders; potable water for consumption by employees; first aid kit, rubber gloves and respirators and/or face masks for use by the employees; and shall have periodic and regular visits by a professional exterminating service to control for rats, fleas and other vermin. Adequate heat and air conditioning shall be provided.

~~b) A Health and Safety Committee including employee representative selected by the Union shall meet as agreed to by the parties, but in any event no less than once every three months. Employees shall be compensated for the time they are meeting or preparing for a meeting.~~

c) Employees shall not be ~~required~~ **disciplined for not** participating in company sponsored exercise sessions.

~~d) The Union retains the right to grieve any workload or workload increases that are unreasonable compared to industry standards.~~

18. PAID TIME OFF

a). Holidays – Any employee working on the following holidays shall be paid double time for all hours worked that day: New Year's Day, Martin Luther King Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day. If the store is closed for the holiday, employees normally scheduled to work on that day shall be paid time and one half for their regularly scheduled hours for that day. Schedules shall not be changed to avoid payment of holiday pay,

except that the Employer shall determine whether a store is to remain open on any particular day, including a holiday.

b). Sick Days/Personal Days – All employees will one year of service of more shall receive 8 paid sick/personal days. Employees with less than one year of service shall accrue one paid sick/personal day per two months of service. This section is intended to comply with NYC Law Number 2013/046, providing for sick time earned by employees.

1. Sick days shall be taken because of illness or the illness of a dependent, or due to a doctor's appointment or the doctor's appointment of a dependent, and the employee shall receive the pay for the hours they were scheduled to work that day, provided that the employee notifies the employer within one hour of the starting time of their shift of their absence due to sickness. Such days may also be scheduled in advance as a personal day with pay provided that the employee and the employer agree, it being understood that the employer will not unreasonably withhold its consent. Unused sick days will be bought back and paid, at the full rate, in the first pay check received in January of each year. An employee may choose to carry over up to ten (10) unused sick days into the next calendar year provided, however, that the employee gives the Employer written notice of such intent by November 1st. An employee can accrue up to a maximum of thirty (30) days of sick leave.

c) Vacation – All employees with one or more years of service shall receive paid time off each year equal to one week. Employees with two or more years of service shall receive paid time off each year equal to two weeks. Employees with five or more years of service shall receive paid time off each year equal to three weeks.

1. Eligibility for vacation shall be determined as of the beginning of each calendar year. Employees with less than the requisite year(s) of service as of the beginning of the calendar year must wait until their anniversary date to be eligible to take the vacation. Vacations are to be scheduled by mutual consent of the employer and the employee. Employees who do not take their vacation entitlement by the end of the calendar year shall be paid for their unused vacation time. The employee may also choose to take their unused vacation from one year in the first quarter of the next calendar year.

c.) Bereavement Leave – Employees shall receive bereavement leave of three days duration, unpaid, in the event of the death of an immediate family member, including spouse, child, parent, sibling, step-parent, grandparent or in-law parents. Proof of death may be requested by the employer.

d.) In the event a location is shut down, employees who lose their jobs as a consequence of the shutdown shall be entitled to receive payment for unused sick time, vacation or any other paid time off and shall be entitled to the benefits provided under Article 19, Severance.

e) All paid time off benefits shall be prorated for part time employees. All employees entitled to receive vacation with pay shall receive a full week off regardless of how many days they are scheduled to work in a week. Part-time employees shall receive vacation pay equal to the average number of hours they were scheduled to work for the 13 weeks prior to taking the vacation. All employees who take a sick or personal day shall receive pay equal to the number of hours they were scheduled to work that day.

Open – **the Union will accept the schedule as it appears in the Employee Handbook for Holidays and Vacation, language to be discussed)**

19. RENEWAL

a) This Agreement shall be effective on the 1st day of _____ 2014 and shall remain in full force and effect to and through the last day of _____ 2017. This agreement shall automatically renew for additional terms of one year unless one of the parties sends written notice by registered mail to the other of its intention to propose modifications hereto between 90 and 60 days prior to the termination date of this agreement, or any subsequent automatic extension.

b) This Agreement shall constitute the sole and entire agreement between the parties with respect to rates of pay, wages, hours and all other terms and conditions of employment. This Agreement may not be amended, modified, waived, extended or otherwise revised, and no agreement, alteration, understanding, variation, waiver or modification of any of the terms or conditions or covenants contained herein shall be made, unless made by agreement in writing duly executed by the parties hereto.

c) Should any part or provision herein contained be rendered or declared invalid by reason of any existing or subsequently enacted legislation, by any decree of a court of competent jurisdiction or by reason of any rule or regulation or order of any presently existing or future created federal, state or municipal agency, such invalidation of such part or portion of this Agreement shall not invalidate the remaining portions hereof, and they shall remain in full force and effect.

20. SEVERANCE - **withdraw**

~~Except in the event of liquidation in bankruptcy, in the event a location is shut down or otherwise discontinued all employees with 1 or more years of service shall receive two weeks' pay per year of service as severance pay. Employees with six months of service shall receive 1 weeks' pay as severance pay. Severance shall be paid on the basis of the employee's regularly scheduled number of hours during the year before the shutdown.~~

21. HEALTH AND WELFARE PLAN – RESERVED – **waiting for Employers response**

IN WITNESS WHEREOF, the parties execute this agreement, effective as of _____ 1, 2014.

FOR LOCAL 338 RWDSU, UFCW

By: _____

Print Name/Title

FOR THE EMPLOYER

By: _____

Print Name/Title

Exhibit C

William Anspach

From:	Neil Gonzalvo <ngonzalvo@local338.org>
Sent:	Wednesday, July 09, 2014 9:52 AM
To:	Stuart Weinberger
Cc:	William Anspach; Yomaira Franqui
Subject:	L338 Unique Proposal document
Attachments:	L338 Unique proposal -7-9-14 neg version 2.docx

Hi Stuart,

I tweaked what I sent you last night. I will make plenty of copies for our meeting later, if you don't have a chance to print this one up.

See you soon,

Neil E. Gonzalvo
Director of Contract Administration & Research
Local 338 RWDSU/UFCW
1505 Kellum Place
Mineola, NY 11501
TEL: 516-294-1338 EXT: 400 | FAX: 516-281-0253
ngonzalvo@local338.org | www.local338.org

Follow us on: www.twitter.com/local338 | www.facebook.com/local338

" Our mission is to better the lives of our members and all working people"

COLLECTIVE BARGAINING AGREEMENT

BETWEEN

LOCAL 338 RWDSU, UFCW

AND

APOGEE RETAIL, NY LLC d/b/a Unique Thrift Store

1. RECOGNITION

a) (1) Apogee Retail NY, LLC (hereafter "Employer") hereby recognizes Local 338 of the Retail, Wholesale, and Department Store Union, UFCW (hereafter "Union") as the exclusive representative of all full-time and regular part-time line workers employed by the Employer at its facility located at 218 West 234th Street, Bronx, NY., including workers carrying out functions such as Pricer, Pusher, Hanger, Sorter, Maintenance, Pick-Up, Cleaner, Sales Associate, Cashier, Floater, and Bagger, but excluding all other employees, including office clerical employees, general managers, store managers, department managers, and guards, and professional employees and supervisors as defined in the Act.

(2) Bargaining unit work shall not be performed by other than bargaining unit employees except for owners, managers and supervisors that Employer deems necessary on a temporary basis.

Non bargaining unit employees may perform unit work for the purpose of instructing, training and assisting bargaining unit employees in the performance of their work. Non unit personnel may also perform unit work in emergencies, provided such work shall be of short duration (not to exceed ~~three (3)~~ *five (5)* consecutive days in the absence of consent of the Union which shall not be unreasonably withheld) and is not done for the purpose of reducing the size of the bargaining unit.

b) (1) Representatives of the Union shall have the right to visit the Employer's place of business at reasonable times to investigate wages, hours working conditions and grievances. Such visits, however, shall not be made at such times or in such a manner that shall interfere with the operations of the Employer's business. The Union shall notify the Employer in advance of the Union's intention to visit the Employer's place of business. The Union agent shall have only access to areas at the Employer's place of business where the bargaining unit employees are located, at times where the bargaining unit employees are at the Employer's place of business or where it is necessary to investigate the wages, hours and working conditions.

~~(2) The Union will be permitted to post notices or distribute literature in any area of the Employer's premises to which the public does not have access and where work is otherwise not performed~~. **Union Withdraws 7-9-14**

(3) The Employer will provide bulletin board space, which shall be used solely for the purpose of posting authorized Union notices. ~~Said bulletin boards will be located in the stock room and break room.~~

(4) The Employer shall provide the Union with the names of all employees and their addresses, phone numbers and rates of pay within thirty (30) days after hire and every six months commencing upon the execution of the collective bargaining agreement upon request of the Union. ~~On a quarterly basis the Employer shall provide the Union with information necessary for the Union to ensure compliance with the terms of this agreement, including names of all employees (including newly hired employees), addresses, home and cell phone telephone numbers, and email addresses and employees' rates of pay and hours of work.~~

~~(5) The Employer and Union agree to meet as needed and is reasonable under the circumstances to administer this agreement.~~ Union Withdraws 7-9-14

~~(6) The Employer agrees to recognize the Union as the collective bargaining representative of any future bargaining unit in which the Union demonstrates a majority showing of interest in the form of signed cards. The Company agrees to abide by the certification of cards by a third party that is mutually agreeable to both parties at the time that the request for recognition letter is sent to the Company. If no mutually acceptable parties can be agreed to, the cards shall be reviewed and checked by the National Labor Relations Board.~~

2. MANAGEMENT RIGHTS/MODIFICATION

~~a) The Union shall deal with the Employer in good faith, including officers and agents selected by the Employer.~~

~~b) The Union recognizes that the Employer retains the right to exercise the customary functions of management in operating its facility, subject to the express limitations of this Agreement. The Employer may promulgate written work rules provide the rules do not violate any of the provisions of this Agreement. The Employer shall furnish the Union with a copy of any such work rules.~~

~~c) This agreement cannot be changed orally. Any changes must be in writing signed by the parties.~~

The Union recognizes the right of the Employer to establish and implement the policies of the Employer. It is recognized that the Employer retains the right to exercise the customary functions of management in operating its facility. Such rights shall include, but are not limited to, location of operation, types of equipment to be used or materials purchased or sold, and whether or to what extent any services or activities of any nature whatsoever shall be added, modified, eliminated or obtained by contract with any other company. These management rights also include the right to hire and determine the number of employees in the facility or a

department including the number assigned to any particular work, to increase or decrease the number of employees, ~~to sub contract~~, to direct and assign work, to establish new job classifications and job content and qualifications, to determine when and where overtime shall be worked, to establish and schedule the working hours of the employees, to determine the reasonable work pace, work performance levels and standards of performance of the employees, tot require safety devices and equipment, to layoff, to discipline for just cause, to discharge for just cause, to suspend for just cause, to transfer, to promote and to take any action considered necessary to establish and maintain efficiency and discipline. The Employer may promulgate written work rules provided the rules do not violate any of the provisions of this Agreement. The Employer shall furnish the Union with a copy of such work rules.

3. UNION SECURITY

a) As a condition of continued employment, all current employees who are covered by this contract shall, within ~~thirty-one (31)~~ **ninety days (90)** of the effective date of this agreement or the date of its execution, whichever is later, become and remain members in good standing of the Union. As a condition of employment, all employees hired after the effective or execution date of this agreement, whichever is later, shall become Union members within ~~thirty-one (31)~~ **ninety days (90) days** of becoming employed and shall remain members thereof.

b) Upon receipt of a written authorization from the Union, the Employer shall, pursuant to such authorization and provided such authorization has not been revoked, deduct from the wages due each such employee each pay period a regular share of the monthly union dues/fees and shall remit to the Union each month the dues/fees collected, together with a list of all employees for whom dues/fees are being remitted and an indication of the amount being remitted for each.

The Employer agrees to deduct and transmit to the Treasurer of RWDSU Local 338 PAC the amount specified for each hour worked from the wages of those employees who voluntarily authorize such contributions on the forms provided for that purpose by RWDSU Local 338 PAC. These transmittals shall occur monthly and shall be accompanied by a list of the names of those employees for whom such deductions have been made and the amount deducted for each such employee.

c) The Company may give notice to the Union of job openings, but the Company retains the right to use whatever sources it deems appropriate to obtain new hires and the Company's right to hire an employee shall be in the Company's sole discretion.

4. EMPLOYMENT/PROBATIONARY PERIOD

a) The Employer shall be the sole judge as to the qualifications of any applicant for employment.

b) All new employees hired by the Employer shall be subject to a probationary period of 90 days (excluding three or more continuous absences). All such probationary employees may be disciplined or discharged by the Employer during such probationary period without recourse by the Union or the employee and such discipline or discharge shall not be subject to the grievance and arbitration procedure contained herein. Probationary employees shall not be entitled to any of the benefits including, but not limited to, paid time off, provided in this Agreement until completion of the probationary period.

5. HOURS OF WORK/OVERTIME

a) (1) All hours actually worked in excess of forty (40) hours in one week shall be paid at the rate of one and one-half times the employee's regular straight-time hourly wage. All overtime must be authorized in advance by the Employer.

(2) Assignment of overtime work shall be in the discretion of the Employer, and the Employer may require any employee to work overtime on a reverse seniority basis. However, prior to mandatory overtime, the Employer shall offer overtime on a voluntary basis to qualified employees by seniority.

b) There shall be no pyramiding of overtime pay.

c) Schedules shall be posted at least two weeks in advance and shall list the employee by name. No employee shall be required to work a schedule where they work on more than six days out of the week. Schedules once posted shall remain in effect and shall not be changed without the consent of the employee, unless there is an emergency.

d) Full time employees are defined as those regularly scheduled to work forty (40) or more hours in a week. ~~The Employer may during its busy seasons (Easter, summer months, back to school and Christmas) temporarily increase the hours of part-time employees, if the employee consents. Part-time employees shall be entitled to all of the benefits provided in this Agreement.~~ **Union Withdraws 7-9-14**

~~f) Full time employees must constitute a minimum of 80% percent of the bargaining unit's work force. Employees with full time status shall not be reclassified to part time unless the employee consents.~~

g) All employees scheduled to work more than five (5) hours in a day shall be required to take a mandatory thirty (30) minute unpaid lunch or dinner break to begin no earlier than 2 hours after starting work and end no later than 2 hours before the end of the work day. There are no split shifts.

~~h) Any employee scheduled for 7 or more hours of work in a day shall be granted one half hour paid lunch or dinner break to begin no earlier than 3 hours after starting work or ending no later than 3 hours before the end of the work day. Employees shall have two 10 minute paid~~

~~breaks not to be taken any closer than two hours before or after the lunch/dinner break. With the consent of the employee the break may be taken together in conjunction with the meal period. Employee shall not be permitted to work through their breaks.~~ Union Withdraws 7-9-14

i) Employees shall be permitted to leave the premises of the employer on their meal period or break, provided that they return on time.

~~ii) Schedules shall be posted no later than one week in advance, and shall list employees by name. Employees who do not work on Saturday or Sunday will be provided with a telephone number to contact a manager to find out their schedule for the coming week. Schedules shall not be changed without workers' written consent.~~

6. TRANSFERS

There shall be no involutary transfer of any employee to another store. However, if an employee wishes to transfer to another store, the Employer may transfer the employee to that store, as long as the employee submits their request in writing and written notice is given to the Union.

7. WAGES

(a) **All employees shall receive the following raises as follows:**

Effective upon Ratification - $0.75 per hour (employees who have completed their trial period) ***open***

Effective one year after Ratification - $0.25 per hour (employees who have been employed for at least a year) ***ok***

Effective two years after Ratification - $0.25 per hour (employees who have been employer for at least a year) ***ok***

(b) Any employee who is on an approved leave of absence on the date of any of the wage increases above shall receive the increase upon return to their employment.

(c) Upon completion of their probationary period, the regular hourly rate for all employees shall be increased by ~~thirty five ($0.35)~~ twenty five ($0.25) cents per hour. *ok*

(d) The Company shall maintain its pay period and pay day unless it notifies the Union of a change.

(e) All appropriate statutory deductions shall be made by the employer. The Employer shall cover all employees in accordance with the law for disability insurance, unemployment insurance and workers compensation.

~~8. CHILD LABOR - withdraw Union Proposal~~

~~None of the Employer's work may be performed in violation of child labor laws.~~ Union Withdraws 7-9-14

9. SENIORITY

a) Seniority shall be measured for purpose of layoff and recall by date of hire. Should layoffs become necessary, layoffs and recall shall be made on the basis of seniority and qualifications. All employees laid off shall have recall rights for up to six (6) months and the Employer shall not hire new employees before recalling laid off employees who have the right to recall. An employee's failure to respond or return from recall within five (5) days of confirmed receipt of a recall letter (as established by use of certified mail) shall terminate the employee's recall rights. All correspondence referenced in this paragraph shall be copied to the Union.

b) At least two weeks before any layoff is implemented the Employer shall notify the union in writing of the date of the layoff and the identity of the employee to be laid off ~~and any offers of other employment conveyed to the employee to avoid a layoff as well as the amount of severance to be paid~~.

10. DISCIPLINE/DISCHARGE

a) No employee covered by this agreement shall be disciplined, suspended or discharged except for just cause. The Employer shall ~~endeavor to give the Union 24 hours advance notice of a suspension or discharge and in every event must~~ give the Union notice of a suspension or discharge within ~~24~~ **96** hours after issuing a suspension or discharge.

11. GRIEVANCE AND ARBITRATION

A. Any grievance or dispute arising out of the application or interpretation of this

Agreement and not specifically excluded from the grievance procedure shall be adjusted as follows:

1. All grievances must be presented in writing.
2. A grievance involving an employee must be grieved as follows:

   Step1: The employee or the Union must present the grievance to the employee's supervisor within twenty (20) business days after the event giving rise to the

grievance occurred. Step 2: The Employer's Store Manager or his designee will meet with the Union within ten(10) days after the submission by the Union. If the matter is not resolved, the Union may file for arbitration within twenty (20) days of the meeting.

3. A grievance involving more than one employee or a Union grievance involving a storewide grievance shall be presented by the Union to the Employer's President or his designee within twenty (20) business days after the event giving rise to the grievance. The Employer's President or his designee will meet with the Union within ten (10) days after the submission by the Union. If the matter is not resolved, the Union may file for arbitration within twenty (20) days of the meeting.

4. A Company grievance shall be presented to the Union within twenty (20) business days after the event giving rise to the grievance. The Employer's President or Store Manager or a designee will meet with the Union within seven (7) days after the submission by the Company. If the matter is not resolved, the Company may file for arbitration within twenty (20) days after the meeting.

B. Any grievance submitted to arbitration shall be referred to Roger Maher or Robert Herzog, who shall be selected on a rotating basis.

C. The arbitrator shall have no authority to add or subtract from or change, modify or amend any terms or provisions of this Agreement. The arbitrator shall issue in writing a final and binding decision.

D. The Employer and the Union will share equally in the cost of the arbitrator.

E. The failure by a party filing the grievance to file timely the grievance and to follow the time limits in the steps in the grievance procedure shall be a bar the grievance.

12. NO STRIKES/NO LOCKOUTS

a) The Union agrees that during the term of this Agreement neither it nor any employee(s) covered by this Agreement will cause, sanction, encourage or engage in any strike, walkout, **picketing** or sympathy strike at the employer's premises.

b) During the term of this Agreement the Employer shall not engage in a lockout.

(Open to discussion)

13. JURY DUTY

An employee summoned to jury duty shall immediately inform and provide a copy of the summons to the Employer. In such event, the employee shall be given an unpaid leave of absence to attend to jury duty.

14. LEAVES OF ABSENCE

a) The Employer may grant leaves of absence, in writing, to employees desiring them not to exceed ninety (90) days. The Employer may extend the leave based on an individual's circumstances. Such leaves shall be without pay. Seniority shall not be broken provided the employee timely returns from the leave. ~~During any such temporary leave, the Employer may replace the employee with a temporary new hire. Such temporary employee shall be covered by this contract, except that his/her termination shall not be subject to the grievance and arbitration procedures contained herein. Any employee hired as a temporary employee under this Section shall be informed in writing (with a copy to the Union) of his/her temporary status at the time of hire.~~

~~b) Before hiring a temporary employee the Employer shall notify the Union in writing of its intention to do so and the duration of the employment and the name of the employee on leave. Also a copy of the leave of absence shall be provided the Union. Any temporary employee, who continues to be employed beyond his original term of hire, shall be covered by all the terms of this Agreement except that he does not have to complete a probationary period of employment provided that he/she has been employed for more than 60 days as a temporary.~~

c) The employer shall give FMLA leave as required by law.

15. UNIFORMS

Employees shall not be required to pay for uniforms required by the Employer to be worn on the job. The Employer will provide employees with new uniforms two times a year, and will provide one replacement uniform per year in the case that a uniform is lost, stolen or ruined.

~~16. EQUAL RIGHTS~~

~~There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, sexual orientation, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the American Disabilities Act, the Age Discrimination in Employment Act, 42 U.S.C. 1981, the Family and Medical Leave Act, the New York State Executive, the New York City Administrative Code or any other similar laws, rules and regulations. All such claims shall be subject to the grievance and arbitration procedure as the sole and exclusive~~

~~remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.~~

~~The Employer shall not discriminate against any present or future employee or applicant for employment by reason of race, creed, color, age, disability, national origin, sex, sexual orientation, union membership, marital or parental status, gender identity or expression, pregnancy or any other characteristic protected by local, state or federal law.~~

~~The foregoing shall not prohibit or limit in any way the obligation of the employer under law to accommodate an employee's needs to participate in religious observances and/or the Sabbath.~~ Union Withdraws 7-9-14

17. HEALTH AND SAFETY

a) The Employer shall have clean and functioning rest rooms for use by the employees; proper ladders; potable water for consumption by employees; first aid kit and rubber gloves and ~~respirators and/or face masks~~ for use by the employees; and shall have periodic and regular visits by a professional exterminating service ~~to control for rats, fleas and other vermin~~. Adequate heat and air conditioning shall be provided.

~~b) A Health and Safety Committee including employee representative selected by the Union shall meet as agreed to by the parties, but in any event no less than once every three months. Employees shall be compensated for the time they are meeting or preparing for a meeting.~~

~~c) Employees shall not be required disciplined for not participating in company sponsored exercise sessions.~~ Union Withdraws 7-9-14

~~d) The Union retains the right to grieve any workload or workload increases that are unreasonable compared to industry standards.~~

18. PAID TIME OFF

a). Holidays – Any employee working on the following holidays shall be paid double time for all hours worked that day: New Year's Day, Martin Luther King Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day. If the store is closed for the holiday, employees normally scheduled to work on that day shall be paid time and one half for their regularly scheduled hours for that day. Schedules shall not be changed to avoid payment of holiday pay, except that the Employer shall determine whether a store is to remain open on any particular day, including a holiday.

b). Sick Days/Personal Days – All employees will one year of service of more shall receive 8 paid sick/personal days. Employees with less than one year of service shall accrue one paid

sick/personal day per two months of service. This section is intended to comply with NYC Law Number 2013/046, providing for sick time earned by employees.

1. Sick days shall be taken because of illness or the illness of a dependent, or due to a doctor's appointment or the doctor's appointment of a dependent, and the employee shall receive the pay for the hours they were scheduled to work that day, provided that the employee notifies the employer within one hour of the starting time of their shift of their absence due to sickness. Such days may also be scheduled in advance as a personal day with pay provided that the employee and the employer agree, it being understood that the employer will not unreasonably withhold its consent. Unused sick days will be bought back and paid, at the full rate, in the first pay check received in January of each year. An employee may choose to carry over up to ten (10) unused sick days into the next calendar year provided, however, that the employee gives the Employer written notice of such intent by November 1st. An employee can accrue up to a maximum of thirty (30) days of sick leave.

c) Vacation – All employees with one or more years of service shall receive paid time off each year equal to one week. Employees with two or more years of service shall receive paid time off each year equal to two weeks. Employees with five or more years of service shall receive paid time off each year equal to three weeks.

1. Eligibility for vacation shall be determined as of the beginning of each calendar year. Employees with less than the requisite year(s) of service as of the beginning of the calendar year must wait until their anniversary date to be eligible to take the vacation. Vacations are to be scheduled by mutual consent of the employer and the employee. Employees who do not take their vacation entitlement by the end of the calendar year shall be paid for their unused vacation time. The employee may also choose to take their unused vacation from one year in the first quarter of the next calendar year.

c.) Bereavement Leave – Employees shall receive bereavement leave of three days duration, unpaid, in the event of the death of an immediate family member, including spouse, **child**, parent, sibling, step-parent, grandparent or in-law parents. Proof of death may be requested by the employer.

d.) In the event a location is shut down, employees who lose their jobs as a consequence of the shutdown shall be entitled to receive payment for unused sick time, vacation or any other paid time off and shall be entitled to the benefits provided under Article 19, Severance.

e) All paid time off benefits shall be prorated for part time employees. All employees entitled to receive vacation with pay shall receive a full week off regardless of how many days they are scheduled to work in a week. Part-time employees shall receive vacation pay equal to the average number of hours they were scheduled to work for the 13 weeks prior to taking the vacation. All employees who take a sick or personal day shall receive pay equal to the number of hours they were scheduled to work that day.

Open – **the Union will accept the schedule as it appears in the Employee Handbook for Holidays and Vacation**, language to be discussed)

19. RENEWAL

a) This Agreement shall be effective on the 1st day of _____ 2014 and shall remain in full force and effect to and through the last day of _____ 2017. This agreement shall automatically renew for additional terms of one year unless one of the parties sends written notice by registered mail to the other of its intention to propose modifications hereto between 90 and 60 days prior to the termination date of this agreement, or any subsequent automatic extension.

b) This Agreement shall constitute the sole and entire agreement between the parties with respect to rates of pay, wages, hours and all other terms and conditions of employment. This Agreement may not be amended, modified, waived, extended or otherwise revised, and no agreement, alteration, understanding, variation, waiver or modification of any of the terms or conditions or covenants contained herein shall be made, unless made by agreement in writing duly executed by the parties hereto.

c) Should any part or provision herein contained be rendered or declared invalid by reason of any existing or subsequently enacted legislation, by any decree of a court of competent jurisdiction or by reason of any rule or regulation or order of any presently existing or future created federal, state or municipal agency, such invalidation of such part or portion of this Agreement shall not invalidate the remaining portions hereof, and they shall remain in full force and effect.

20. SEVERANCE - **withdraw**

~~Except in the event of liquidation in bankruptcy, in the event a location is shut down or otherwise discontinued all employees with 1 or more years of service shall receive two weeks' pay per year of service as severance pay. Employees with six months of service shall receive 1 weeks' pay as severance pay. Severance shall be paid on the basis of the employee's regularly scheduled number of hours during the year before the shutdown.~~

21. HEALTH PLAN

As of January 1, 2015, the Employer will offer the same Qualified Health Plan options and employee co-contributions to eligible bargaining unit employees (currently those employees who are scheduled to work on average thirty (30) hours or more per week), as the employer offers non bargaining unit employees.

IN WITNESS WHEREOF, the parties execute this agreement, effective as of _____ 1, 2014.

FOR LOCAL 338 RWDSU, UFCW

By: _____

Print Name/Title

FOR THE EMPLOYER

By: _____

Print Name/Title

Exhibit D

William Anspach

From: Neil Gonzalvo <ngonzalvo@local338.org>
Sent: Thursday, July 17, 2014 5:05 PM
To: Stuart Weinberger
Cc: William Anspach; Jack Caffey; Yomaira Franqui
Subject: L338 Unique proposal
Attachments: L338 Unique proposal -7-17-14.docx

Hi Stuart,

Attached, please find the Union's counter proposal dated 7-17-14.

I incorporated the language we discussed at our last session. The open items are in bold. Please call me to discuss.

If we can't resolve the open items on the phone or via email, we are available to continue negotiations face to face.

We are available to meet any day next week.

Thank you,

Neil E. Gonzalvo
Director of Contract Administration & Research
Local 338 RWDSU/UFCW
1505 Kellum Place
Mineola, NY 11501
TEL: 516-294-1338 EXT: 400 | FAX: 516-281-0253
ngonzalvo@local338.org | www.local338.org

Follow us on: www.twitter.com/local338 | www.facebook.com/local338

"Our mission is to better the lives of our members and all working people"

7/17/14

Memo of AGREEMENT

BETWEEN

LOCAL 338 RWDSU, UFCW

AND

APOGEE RETAIL, NY LLC d/b/a Unique Thrift Store

1. RECOGNITION

a) (1) Apogee Retail NY, LLC (hereafter "Employer") hereby recognizes Local 338 of the Retail, Wholesale, and Department Store Union, UFCW (hereafter "Union") as the exclusive representative of all full-time and regular part-time line workers employed by the Employer at its facility located at 218 West 234th Street, Bronx, NY., including workers carrying out functions such as Pricer, Pusher, Hanger, Sorter, Maintenance, Pick-Up, Cleaner, Sales Associate, Cashier, Floater, and Bagger, but excluding all other employees, including office clerical employees, general managers, store managers, department managers, and guards, and professional employees and supervisors as defined in the Act.

(2) Bargaining unit work shall not be performed by other than bargaining unit employees except for owners, managers and supervisors that Employer deems necessary **and is not done for the purpose of reducing the size of the bargaining unit.** ~~on a temporary basis.~~

Non bargaining unit employees (except for owners, managers and supervisors as set forth above) may perform unit work for the purpose of instructing, training and assisting bargaining unit employees in the performance of their work. Non unit personnel may also perform unit work in emergencies, provided such work shall be of short duration (not to exceed five (5) consecutive days) in the absence of consent of the Union which shall not be unreasonably withheld) and is not done for the purpose of reducing the size of the bargaining unit. ***Open Stuart will respond***

b) (1) Representatives of the Union shall have the right to visit the Employer's place of business at reasonable times to investigate wages, hours working conditions and grievances. Such visits, however, shall not be made at such times or in such a manner that shall interfere with the operations of the Employer's business. The Union shall notify the Employer in advance of the Union's intention to visit the Employer's place of business. The Union agent shall have only access to areas at the Employer's place of business where the bargaining unit employees are located, at times where the bargaining unit employees are at the Employer's place of business or where it is necessary to investigate the wages, hours and working conditions.

(2) The Employer will provide bulletin board space, which shall be used ~~solely~~ for the purpose of posting authorized Union notices. ~~Said bulletin boards will be located in the stock room and break room.~~ *Open, Stuart will respond*

(3) The Employer shall provide the Union with the names of all employees and their addresses, phone numbers and rates of pay within thirty (30) days after hire and every six months commencing upon the execution of the collective bargaining agreement upon request of the Union.

2. MANAGEMENT RIGHTS/MODIFICATION

The Union recognizes the right of the Employer to establish and implement the policies of the Employer. It is recognized that the Employer retains the right to exercise the customary functions of management in operating its facility. Such rights shall include, but are not limited to, location of operation, types of equipment to be used or materials purchased or sold, and whether or to what extent any services or activities of any nature whatsoever shall be added, modified, eliminated or obtained by contract with any other company. These management rights also include the right to hire and determine the number of employees in the facility or a department including the number assigned to any particular work, to increase or decrease the number of employees, **to sub contract to facilities outside of the store for production work,** to direct and assign work, to establish new job classifications and job content and qualifications, to determine when and where overtime shall be worked, to establish and schedule the working hours of the employees, to determine the reasonable work pace, work performance levels and standards of performance of the employees, to require safety devices and equipment, to layoff, to discipline for just cause, to discharge for just cause, to suspend for just cause, to transfer, to promote and to take any action considered necessary to establish and maintain efficiency and discipline. The Employer may promulgate written work rules provided the rules do not violate any of the provisions of this Agreement. The Employer shall furnish the Union with a copy of such work rules.

3. UNION SECURITY

a) As a condition of continued employment, all current employees who are covered by this contract shall, within ~~thirty-one (31)~~ **ninety days (90)** of the effective date of this agreement or the date of its execution, whichever is later, become and remain members in good standing of the Union. As a condition of employment, all employees hired after the effective or execution date of this agreement, whichever is later, shall become Union members within ~~thirty-one (31)~~ **ninety days (90) days** of becoming employed and shall remain members thereof.

b) Upon receipt of a written authorization from the Union, the Employer shall, pursuant to such authorization and provided such authorization has not been revoked, deduct from the wages due each such employee each pay period a regular share of the monthly union dues/fees and shall

remit to the Union each month the dues/fees collected, together with a list of all employees for whom dues/fees are being remitted and an indication of the amount being remitted for each.

The Employer agrees to deduct and transmit to the Treasurer of RWDSU Local 338 PAC the amount specified for each hour worked from the wages of those employees who voluntarily authorize such contributions on the forms provided for that purpose by RWDSU Local 338 PAC. These transmittals shall occur monthly and shall be accompanied by a list of the names of those employees for whom such deductions have been made and the amount deducted for each such employee. *Open, Stuart will respond*

c) The Company may give notice to the Union of job openings, but the Company retains the right to use whatever sources it deems appropriate to obtain new hires and the Company's right to hire an employee shall be in the Company's sole discretion.

4. EMPLOYMENT/PROBATIONARY PERIOD

a) The Employer shall be the sole judge as to the qualifications of any applicant for employment.

b) All new employees hired by the Employer shall be subject to a probationary period of 90 days. All such probationary employees may be disciplined or discharged by the Employer during such probationary period without recourse by the Union or the employee and such discipline or discharge shall not be subject to the grievance and arbitration procedure contained herein. Probationary employees shall not be entitled to any of the benefits including, but not limited to, paid time off, provided in this Agreement until completion of the probationary period.

5. HOURS OF WORK/OVERTIME

a) (1) All hours actually worked in excess of forty (40) hours in one week shall be paid at the rate of one and one-half times the employee's regular straight-time hourly wage. All overtime must be authorized in advance by the Employer.

(2) Assignment of overtime work shall be in the discretion of the Employer. Prior to mandatory overtime, the Employer shall offer overtime on a voluntary basis to qualified employees by seniority. The Employer may require any employee to work overtime on a reverse seniority basis and based on qualifications.

b) There shall be no pyramiding of overtime pay.

c) Schedules shall be posted at least two weeks in advance and shall list the employee by name. No employee shall be required to work a schedule where they work on more than six days

out of the week. Schedules once posted shall remain in effect and shall not be changed without the consent of the employee, **unless there is an unforeseen operational necessity to do so.**

d) Full time employees are defined as those regularly scheduled to work forty (40) or more hours in a week

e) All employees scheduled to work more than five (5) hours in a day shall be required to take a mandatory thirty (30) minute unpaid lunch or dinner break to begin no earlier than 2 hours after starting work and end no later than 2 hours before the end of the work day. There are no split shifts.

f) Employees shall be permitted to leave the premises of the employer on their meal period or break, provided that they return on time.

6. TRANSFERS

There shall be no involuntary transfer of any employee to another store. However, if an employee wishes to transfer to another store, the Employer may transfer the employee to that store, as long as the employee submits their request in writing and written notice is given to the Union.

7. WAGES

(a) All employees shall receive the following raises as follows:

Effective upon Ratification - $0.50 per hour (employees who have completed their trial period) ***open***

Effective one year after Ratification - $0.25 per hour (employees who have been employed for at least a year) ***ok***

Effective two years after Ratification - $0.25 per hour (employees who have been employer for at least a year) ***ok***

(b) Any employee who is on an approved leave of absence on the date of any of the wage increases above shall receive the increase upon return to their employment.

(c) Upon completion of their probationary period, the regular hourly rate for all employees shall be increased by twenty five ($0.25) cents per hour. *ok*

(d) The Company shall maintain its pay period and pay day unless it notifies the Union of a change.

(e) All appropriate statutory deductions shall be made by the Employer. The Employer shall cover all employees in accordance with the law for disability insurance, unemployment insurance and workers compensation.

8. SENIORITY

a) Seniority shall be measured for purpose of layoff and recall by date of hire. Should layoffs become necessary, layoffs and recall shall be made on the basis of seniority and qualifications. All employees laid off shall have recall rights for up to six (6) months and the Employer shall not hire new employees before recalling laid off employees who have the right to recall. An employee's failure to return from recall within seven (7) days of mailing to the employee's last known address a recall letter shall terminate the employee's recall rights. All correspondence referenced in this paragraph shall be copied to the Union.

b) At least two weeks before any layoff is implemented the Employer shall notify the union in writing of the date of the layoff and the identity of the employee to be laid off.

9. DISCIPLINE/DISCHARGE

a) No employee covered by this agreement shall be disciplined, suspended or discharged except for just cause. The Employer shall give the Union notice of a suspension or discharge within ninety six (96) hours after issuing a suspension or discharge.

10. GRIEVANCE AND ARBITRATION

A. Any grievance or dispute arising out of the application or interpretation of this

Agreement and not specifically excluded from the grievance procedure shall be adjusted as follows:

1. All grievances must be presented in writing.
2. A grievance involving an employee must be grieved as follows:

   Step1: The employee or the Union must present the grievance to the employee's supervisor within twenty (20) business days after the event giving rise to the grievance occurred. Step 2: The Employer's Store Manager or his designee will meet with the Union within ten(10) days after the submission by the Union. If the matter is not resolved, the Union may file for arbitration within twenty (20) days of the meeting.

3. A grievance involving more than one employee or a Union grievance involving a storewide grievance shall be presented by the Union to the Employer's President or his designee within twenty (20) business days after the event giving rise to the grievance. The Employer's President or his designee will meet with the Union within ten (10) days after the submission by the Union. If the matter is not resolved, the Union may file for arbitration within twenty (20) days of the meeting.

4. A Company grievance shall be presented to the Union within twenty (20) business days after the event giving rise to the grievance. The Employer's President or Store Manager or a designee will meet with the Union within seven (7) days after the submission by the Company. If the matter is not resolved, the Company may file for arbitration within twenty (20) days after the meeting.

B. Any grievance submitted to arbitration shall be referred to Roger Maher or Robert Herzog, who shall be selected on a rotating basis.

C. The arbitrator shall have no authority to add or subtract from or change, modify or amend any terms or provisions of this Agreement. The arbitrator shall issue in writing a final and binding decision.

D. The Employer and the Union will share equally in the cost of the arbitrator.

E. The failure by a party filing the grievance to file timely the grievance and to follow the time limits in the steps in the grievance procedure shall be a bar the grievance.

11. NO STRIKES/NO LOCKOUTS

A. No Employee or Employees shall engage in any strike, picketing, sit-down, slow-down, sit-in, cessation or stoppage or interruption of work, boycott or other interference with the operations of the Employer.

B. For the duration of this Agreement, the Union, its officers, agents, representatives, members and unit employees, shall not directly or indirectly, call, authorize, cause or assist in a strike, refusal to work, boycott, picket, hand bill, sit-in, slowdown, or other acts which interfere with the operations at the facility, whether or not the matter is covered by this Agreement or the collective bargaining relationship.

C. In addition to any other liability, remedy or right provided by applicable law or statute, should a strike, sit-down, cessation or stoppage or interruption of work, boycott, or other interference with the operations of the Employer occur, the Union within a reasonable time of a request by the Employer, shall:

1. Publicly disavow such action by the employees.

2. Advise the Employer in writing that such action by the employees as not been called or sanctioned by the Union.

3. Notify employees of its disapproval of such action and instruct such employees to cease such action and return to work immediately.

D. The Employer agrees that it will not lock-out employees during the term of this Agreement.

12. JURY DUTY

An employee summoned to jury duty shall immediately inform and provide a copy of the summons to the Employer. The Employer shall not pay for the employee for their time that they serve on jury duty other than to pay for jury duty as required in accordance with applicable New York State and Federal law.

14. LEAVES OF ABSENCE

a) The Employer may grant leaves of absence not to exceed ninety (90) days. The Employer may extend the leave based upon an individual's circumstances. The Employer will notify the Union if it extends an employee's leave beyond the ninety (90) days. Such leaves shall be without pay. Seniority shall not be broken provided the employee timely returns from the leave. The employee shall not accumulate or accrue any benefits while out on such leave except as required by law. During a leave of absence, the Employer may hire a temporary employee to replace the employee who is on the leave of absence. The temporary employee shall not be subject to the terms of the collective bargaining agreement.

b) The employer shall give FMLA leave as required by law.

15. UNIFORMS

Employees shall not be required to pay for uniforms required by the Employer to be worn on the job. The Employer will provide employees with new uniforms two times a year, and will provide one replacement uniform per year in the case that a uniform is lost, stolen or ruined.

16. EQUAL RIGHTS

There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, sexual orientation, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the American Disabilities Act, the Age Discrimination in Employment Act, 42 U.S.C. 1981, the Family and Medical Leave Act, the New York State Executive, the New York City Administrative Code or any other similar laws, rules and regulations. All such claims shall be subject to the grievance and arbitration procedure as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

17. HEALTH AND SAFETY

a) The Employer shall have clean and functioning rest rooms for use by the employees; proper ladders; potable water for consumption by employees; first aid kit and rubber gloves for use by the employees; and shall have periodic and regular visits by a professional exterminating service. Adequate heat and air conditioning shall be provided.

18. PAID TIME OFF

a) Holidays – Full-time employees will receive a day off, with pay, for each of the following holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day.

In order to be eligible for holiday pay, an employee must have been employed ninety (90) days and must have worked their last scheduled workday before and first scheduled workday after the holiday.

Holidays that occur during a employee's vacation will not be counted a vacation day, but as a holiday. Employees on leave of absence for any reason are ineligible for holiday benefits or holidays that are observed during eth periods they are on leave.

Holiday pay is computed on the basis of the employee's base hourly rate of pay. Holiday benefits will note be counted as hours worked for the purpose of counting overtime.

b) Sick Days/Personal Days –Employees with less than one year of service shall accrue four (4) hours of sick/personal time per month after ninety (90) days of service. All employees with one year of service of more shall receive eight (8) paid sick/personal days. The Union and the Employer agree that the provisions of the New York City Sick Time Act are waived.

Employees who do not take their sick day/personal day entitlement by the end of the calendar year shall be paid for their unused sick/personal time.

c) Vacation – Vacation time is accrued monthly after the employees ninety (90) day probationary period. All vacation requests must be approved two (2) weeks in advance and are subject to the

manager's approval. Regular employees working 40 hours per week accrue the following paid vacation:

Period of Employment	Hours credited
1 month to 36 months	4 hours/month
37 months to 60 months	6 hours/month
61 months to 120 months	8 hours/month
After 120 months	10 hours/month

All paid vacation time must be taken in eight (8) hours blocks. Except at the discretion of the manager, no two employees may schedule vacations for the same period. In the event of a scheduling conflict, the employee with seniority will have preference.

All vacation hours are earned. Upon separation, all unused vacation hours will be paid. Vacation hours may not be carried from year to year. On the last regular payday of each calendar year, all unused vacation time will be paid in full.

If any employee quits or is terminated before their anniversary date, any accrued vacation time will be paid in accordance with this article.

d) Bereavement Leave – Employees shall receive bereavement leave of three days duration, unpaid, in the event of the death of an immediate family member, including spouse, child, parent, sibling, step-parent, grandparent or in-law parents. Proof of death may be requested by the employer.

19. RENEWAL

a) This Agreement shall be effective on the 1st day of _____ 2014 and shall remain in full force and effect to and through the last day of _____ 2017. This agreement shall automatically renew for additional terms of one year unless one of the parties sends written notice by registered mail to the other of its intention to propose modifications hereto between 90 and 60 days prior to the termination date of this agreement, or any subsequent automatic extension.

b) This Agreement shall constitute the sole and entire agreement between the parties with respect to rates of pay, wages, hours and all other terms and conditions of employment. This Agreement may not be amended; modified, waived, extended or otherwise revised, and no agreement, alteration, understanding, variation, waiver or modification of any of the terms or

conditions or covenants contained herein shall be made, unless made by agreement in writing duly executed by the parties hereto, except as set forth below in 19d.

c) Should any part or provision herein contained be rendered or declared invalid by reason of any existing or subsequently enacted legislation, by any decree of a court of competent jurisdiction or by reason of any rule or regulation or order of any presently existing or future created federal, state or municipal agency, such invalidation of such part or portion of this Agreement shall not invalidate the remaining portions hereof, and they shall remain in full force and effect.

d) In the event the Patient Protection and Affordable Care Act ("ACA") requires the Employer to make changes in the provision of healthcare under the collective bargaining agreement, the Employer and the Union agree that they will meet to discuss the changes that are required related to the Act. The parties agree that the discussions will only involve the changes needed to the healthcare related to the ACA. In the event there is a dispute over the ACA, the parties shall submit said dispute to arbitration in accordance with the grievance and arbitration provisions of this Agreement. The arbitrator shall have no authority and shall not require the Employer to pay more for medical coverage for employees.

20. HEALTH PLAN

As of January 1, 2015, the Employer will offer the same Qualified Health Plan options and employee co-contributions to eligible bargaining unit employees (currently those employees who are scheduled to work on average thirty (30) hours or more per week), as the employer offers non bargaining unit hourly employees.

IN WITNESS WHEREOF, the parties execute this agreement, effective as of _____ 1, 2014.

FOR LOCAL 338 RWDSU, UFCW

By: _____

Print Name/Title

FOR THE EMPLOYER

By: _____

Print Name/Title

Exhibit E

William Anspach

From:	Neil Gonzalvo <ngonzalvo@local338.org>
Sent:	Wednesday, July 23, 2014 9:37 PM
To:	William Anspach; Jack Caffey
Subject:	Fwd: Apogee
Attachments:	L338_Unique_counter_proposal_-7-23-14.docx; ATT00001.htm

FYI.

Neil E. Gonzalvo
Director of Contract Administration & Research
Local 338 RWDSU/UFCW
1505 Kellum Place
Mineola, NY 11501
TEL: 516-294-1338 EXT: 400 | FAX: 516-281-0253
ngonzalvo@local338.org | www.local338.org

Follow us on: www.twitter.com/local338 | www.facebook.com/local338

" Our mission is to better the lives of our members and all working people"

Begin forwarded message:

From: <stuart575@aol.com>
Date: July 23, 2014 at 9:23:11 PM EDT
To: <ngonzalvo@local338.org>
Subject: Apogee

July 23, 2014

Dear Neil,

Attached is the Company's response to the Union's latest proposal. One of the matters, the Company saw, which is not highlighted in the attached proposal, is that the provision for part-timers for paid time-off was not included. Please provide language on this or explain why it was not included.

I hope that all is well.

Stuart

7/17/14

Memo of AGREEMENT

BETWEEN

LOCAL 338 RWDSU, UFCW

AND

APOGEE RETAIL, NY LLC d/b/a Unique Thrift Store

1. RECOGNITION

a) (1) Apogee Retail NY, LLC (hereafter "Employer") hereby recognizes Local 338 of the Retail, Wholesale, and Department Store Union, UFCW (hereafter "Union") as the exclusive representative of all full-time and regular part-time line workers employed by the Employer at its facility located at 218 West 234th Street, Bronx, NY., including workers carrying out functions such as Pricer, Pusher, Hanger, Sorter, Maintenance, Pick-Up, Cleaner, Sales Associate, Cashier, Floater, and Bagger, but excluding all other employees, including office clerical employees, general managers, store managers, department managers, and guards, and professional employees and supervisors as defined in the Act.

(2) Bargaining unit work shall not be performed by other than bargaining unit employees except for owners, managers and supervisors that Employer deems necessary and is not done for the purpose of reducing the size of the bargaining unit. Nothing herein shall be deemed to change the current practices of owners, managers, and supervisors performing bargaining unit work, ~~on a temporary basis.~~

Non bargaining unit employees (except for owners, managers and supervisors as set forth above) may perform unit work for the purpose of instructing, training and assisting bargaining unit employees in the performance of their work. Non unit personnel may also perform unit work in emergencies or where the bargaining unit cannot perform the work, provided such work shall be of short duration (not to exceed ~~ten~~five (10~~5~~) consecutive days) in the absence of consent of the Union which shall not be unreasonably withheld) and is not done for the purpose of reducing the size of the bargaining unit. ***Open Smart will respond***

b) (1) Representatives of the Union shall have the right to visit the Employer's place of business at reasonable times to investigate wages, hours working conditions and grievances. Such visits, however, shall not be made at such times or in such a manner that shall interfere with the operations of the Employer's business. The Union shall notify the Employer in advance of the Union's intention to visit the Employer's place of business. The Union agent shall have only access to areas at the Employer's place of business where the bargaining unit employees are located, at times where the bargaining unit employees are at the Employer's place of business or where it is necessary to investigate the wages, hours and working conditions.

(2) The Employer will provide bulletin board space, which shall be used ~~solely~~ for the purpose of posting authorized Union notices. ~~Said bulletin boards will be located in the stock room and break room.~~ *Open, Stuart will respond*

Response: The Company does not agree to allow the Union to use a bulletin board

(3) The Employer shall provide the Union with the names of all employees and their addresses, phone numbers and rates of pay within thirty (30) days after hire and every six months commencing upon the execution of the collective bargaining agreement upon request of the Union.

2. MANAGEMENT RIGHTS/MODIFICATION

The Union recognizes the right of the Employer to establish and implement the policies of the Employer. It is recognized that the Employer retains the right to exercise the customary functions of management in operating its facility. Such rights shall include, but are not limited to, location of operation, types of equipment to be used or materials purchased or sold, and whether or to what extent any services or activities of any nature whatsoever shall be added, modified, eliminated or obtained by contract with any other company. These management rights also include the right to hire and determine the number of employees in the facility or a department including the number assigned to any particular work, to increase or decrease the number of employees, **to sub-contract to facilities outside of the store for production work**, to direct and assign work, to establish new job classifications and job content and qualifications, to determine when and where overtime shall be worked, to establish and schedule the working hours of the employees, to determine the reasonable work pace, work performance levels and standards of performance of the employees, to require safety devices and equipment, to layoff, to discipline for just cause, to discharge for just cause, to suspend for just cause, to transfer, to promote and to take any action considered necessary to establish and maintain efficiency and discipline. The Employer may promulgate written work rules provided the rules do not violate any of the provisions of this Agreement. The Employer shall furnish the Union with a copy of such work rules.

3. UNION SECURITY

a) As a condition of continued employment, all current employees who are covered by this contract shall, within ~~thirty-one (31)~~ **ninety days (90)** of the effective date of this agreement or the date of its execution, whichever is later, become and remain members in good standing of the Union. As a condition of employment, all employees hired after the effective or execution date of this agreement, whichever is later, shall become Union members within ~~thirty-one (31)~~ **ninety days (90) days** of becoming employed and shall remain members thereof.

Response: Not agreed to by the Employer.

b) Upon receipt of a written authorization from the Union, the Employer shall, pursuant to such authorization and provided such authorization has not been revoked, deduct from the wages due each such employee each pay period a regular share of the monthly union dues/fees and shall remit to the Union each month the dues/fees collected, together with a list of all employees for whom dues/fees are being remitted and an indication of the amount being remitted for each.

Response: Not agreed to by the Employer.

The Employer agrees to deduct and transmit to the Treasurer of RWDSU Local 338 PAC the amount specified for each hour worked from the wages of those employees who voluntarily authorize such contributions on the forms provided for that purpose by RWDSU Local 338 PAC. These transmittals shall occur monthly and shall be accompanied by a list of the names of those employees for whom such deductions have been made and the amount deducted for each such employee. *Open, Smart will respond*

Response: The deduction of monies to a PAC by an employer may be unlawful under NY Law and NYS Department of Labor Regulations, Section 195.45(f). The Union should indicate under what provision this practice would be allowed. If it agrees to this deduction, the Employer would want indemnification from the Union if a claim is made that the monies were deducted unlawfully by the Employer.

c) The Company may give notice to the Union of job openings, but the Company retains the right to use whatever sources it deems appropriate to obtain new hires and the Company's right to hire an employee shall be in the Company's sole discretion.

4. EMPLOYMENT/PROBATIONARY PERIOD

a) The Employer shall be the sole judge as to the qualifications of any applicant for employment.

b) All new employees hired by the Employer shall be subject to a probationary period of 90 days. All such probationary employees may be disciplined or discharged by the Employer during such probationary period without recourse by the Union or the employee and such discipline or discharge shall not be subject to the grievance and arbitration procedure contained herein. Probationary employees shall not be entitled to any of the benefits including, but not limited to, paid time off, provided in this Agreement until completion of the probationary period.

5. HOURS OF WORK/OVERTIME

a) (1) All hours actually worked in excess of forty (40) hours in one week shall be paid at the rate of one and one-half times the employee's regular straight-time hourly wage. All overtime must be authorized in advance by the Employer.

(2) Assignment of overtime work shall be in the discretion of the Employer. Prior to mandatory overtime, the Employer shall offer overtime on a voluntary basis to qualified employees by seniority. The Employer may require any employee to work overtime on a reverse seniority basis and based on qualifications.

b) There shall be no pyramiding of overtime pay.

c) Schedules shall be posted at least two weeks in advance and shall list the employee by name. No employee shall be required to work a schedule where they work on more than six days out of the week. Schedules once posted shall remain in effect and shall not be changed without the consent of the employee, unless there is an unforeseen operational necessity to do so, there is a change made which will benefit the employees, or there is an unforeseen circumstance which requires the change.

d) Full time employees are defined as those regularly scheduled to work forty (40) or more hours in a week

e) All employees scheduled to work more than five (5) hours in a day shall be required to take a mandatory thirty (30) minute unpaid lunch or dinner break to begin no earlier than 2 hours after starting work and end no later than 2 hours before the end of the work day. There are no split shifts.

f) Employees shall be permitted to leave the premises of the employer on their meal period or break, provided that they return on time.

6. TRANSFERS

There shall be no involuntary transfer of any employee to another store. However, if an employee wishes to transfer to another store, the Employer may transfer the employee to that store, as long as the employee submits their request in writing and written notice is given to the Union.

7. WAGES

(a) All employees shall receive the following raises as follows:

Effective upon Ratification - $0.50 per hour (employees who have completed their trial period) ***open***

Response: The Employer rejects this proposal and maintains its wage proposal.

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Effective one year after Ratification - $0.25 per hour (employees who have been employed for at least a year) ***ok***

Effective two years after Ratification - $9.25 per hour (employees who have been employer for at least a year) ok

(b) Any employee who is on an approved leave of absence on the date of any of the wage increases above shall receive the increase upon return to their employment.

(c) Upon completion of their probationary period, the regular hourly rate for all employees shall be increased by twenty five ($0.25) cents per hour. ok

(d) The Company shall maintain its pay period and pay day unless it notifies the Union of a change.

(e) All appropriate statutory deductions shall be made by the Employer. The Employer shall cover all employees in accordance with the law for disability insurance, unemployment insurance and worker's compensation.

8. SENIORITY

a) Seniority shall be measured for purpose of layoff and recall by date of hire. Should layoffs become necessary, layoffs and recall shall be made on the basis of seniority and qualifications. All employees laid off shall have recall rights for up to six (6) months and the Employer shall not hire new employees before recalling laid off employees who have the right to recall. An employee's failure to return from recall within seven (7) days of mailing to the employee's last known address a recall letter shall terminate the employee's recall rights. All correspondence referenced in this paragraph shall be copied to the Union.

b) At least two weeks before any layoff is implemented the Employer shall notify the union in writing of the date of the layoff and the identity of the employee to be laid off.

9. DISCIPLINE/DISCHARGE

a) No employee covered by this agreement shall be disciplined, suspended or discharged except for just cause. The Employer shall give the Union notice of a suspension or discharge within ninety-six (96) hours after issuing a suspension or discharge.

10. GRIEVANCE AND ARBITRATION

A. Any grievance or dispute arising out of the application or interpretation of this

Agreement and not specifically excluded from the grievance procedure shall be adjusted as follows:

1. All grievances must be presented in writing.

2. A grievance involving an employee must be grieved as follows:
   Step 1: The employee or the Union must present the grievance to the employee's supervisor within twenty (20) business days after the event giving rise to the grievance occurred. Step 2: The Employer's Store Manager or his designee will meet with the Union within ten (10) days after the submission by the Union. If the matter is not resolved, the Union may file for arbitration within twenty (20) days of the meeting.

3. A grievance involving more than one employee or a Union grievance involving a storewide grievance shall be presented by the Union to the Employer's President or his designee within twenty (20) business days after the event giving rise to the grievance. The Employer's President or his designee will meet with the Union within ten (10) days after the submission by the Union. If the matter is not resolved, the Union may file for arbitration within twenty (20) days of the meeting.

4. A Company grievance shall be presented to the Union within twenty (20) business days after the event giving rise to the grievance. The Employer's President or Store Manager or a designee will meet with the Union within seven (7) days after the submission by the Company. If the matter is not resolved, the Company may file for arbitration within twenty (20) days after the meeting.

B. Any grievance submitted to arbitration shall be referred to Roger Maher or Robert Herzog, who shall be selected on a rotating basis.

C. The arbitrator shall have no authority to add or subtract from or change, modify or amend any terms or provisions of this Agreement. The arbitrator shall issue in writing a final and binding decision.

D. The Employer and the Union will share equally in the cost of the arbitrator.

E. The failure by a party filing the grievance to file timely the grievance and to follow the time limits in the steps in the grievance procedure shall be a bar the grievance.

11. NO STRIKES/NO LOCKOUTS

A. No Employee or Employees shall engage in any strike, picketing, sit-down, slow-down, sit-in, cessation or stoppage or interruption of work, boycott or other interference with the operations of the Employer.

B. For the duration of this Agreement, the Union, its officers, agents, representatives, members and unit employees, shall not directly or indirectly, call, authorize, cause or assist in a strike, refusal to work, boycott, picket, hand bill, sit-in, slowdown, or other acts which interfere with the operations at the facility, whether or not the matter is covered by this Agreement or the collective bargaining relationship.

C. In addition to any other liability, remedy or right provided by applicable law or statute, should a strike, sit-down, cessation or stoppage or interruption of work, boycott, or other interference with the operations of the Employer occur, the Union within a reasonable time of a request by the Employer, shall:

1. Publicly disavow such action by the employees.

2. Advise the Employer in writing that such action by the employees as not been called or sanctioned by the Union.

3. Notify employees of its disapproval of such action and instruct such employees to cease such action and return to work immediately.

D. The Employer agrees that it will not lock-out employees during the term of this Agreement.

12. JURY DUTY

An employee summoned to jury duty shall immediately inform and provide a copy of the summons to the Employer. The Employer shall not pay for the employee for their time that they serve on jury duty other than to pay for jury duty as required in accordance with applicable New York State and Federal law.

14. LEAVES OF ABSENCE

a) The Employer may grant leaves of absence not to exceed ninety (90) days. The Employer may extend the leave based upon an individual's circumstances. The Employer will notify the Union if it extends an employee's leave beyond the ninety (90) days. Such leaves shall be without pay. Seniority shall not be broken provided the employee timely returns from the leave. The employee shall not accumulate or accrue any benefits while out on such leave except as required by law. During a leave of absence, the Employer may hire a temporary

employee to replace the employee who is on the leave of absence. The temporary employee shall not be subject to the terms of the collective bargaining agreement.

b) The employer shall give FMLA leave as required by law.

15. UNIFORMS

Employees shall not be required to pay for uniforms required by the Employer to be worn on the job. The Employer will provide employees with new uniforms two times a year, and will provide one replacement uniform per year in the case that a uniform is lost, stolen or ruined.

16. EQUAL RIGHTS

There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, sexual orientation, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the American Disabilities Act, the Age Discrimination in Employment Act, 42 U.S.C. 1981, the Family and Medical Leave Act, the New York State Executive, the New York City Administrative Code or any other similar laws, rules and regulations. All such claims shall be subject to the grievance and arbitration procedure as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

17. HEALTH AND SAFETY

a) The Employer shall have clean and functioning rest rooms for use by the employees; proper ladders; potable water for consumption by employees; first aid kit and rubber gloves for use by the employees; and shall have periodic and regular visits by a professional exterminating service. Adequate heat and air conditioning shall be provided.

18. PAID TIME OFF

a) Holidays -- Full-time employees will receive a day off, with pay, for each of the following holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day.

In order to be eligible for holiday pay, an employee must have been employed ninety (90) days and must have worked their last scheduled workday before and first scheduled workday after the holiday.

Holidays that occur during an employee's vacation will not be counted a vacation day, but as a holiday. Employees on leave of absence for any reason are ineligible for holiday benefits or holidays that are observed during thgeth periods they are on leave.

Holiday pay is computed on the basis of the employee's base hourly rate of pay. Holiday benefits will note be counted as hours worked for the purpose of counting overtime.

b) Sick Days/Personal Days –Employees with less than one year of service shall accrue four (4) hours of sick/personal time per month after ninety (90) days of service. ~~All employees with one year of service or more shall receive eight (8) paid sick/personal days.~~ The Union and the Employer agree that the provisions of the New York City Sick Time Act are waived.

Employees who do not take their sick day/personal day entitlement by the end of the calendar year shall be paid for their unused sick/personal time.

c) Vacation – Vacation time is accrued monthly after the employees ninety (90) day probationary period. All vacation requests must be approved two (2) weeks in advance and are subject to the manager's approval. Regular employees working 40 hours per week accrue the following paid vacation:

Period of Employment	Hours credited
1 month to 36 months	4 hours/month
37 months to 60 months	6 hours/month
61 months to 120 months	8 hours/month
After 120 months	10 hours/month

All paid vacation time must be taken in eight (8) hours blocks. Except at the discretion of the manager, no two employees may schedule vacations for the same period. In the event of a scheduling conflict, the employee with seniority will have preference.

All vacation hours are earned. Upon separation, all unused vacation hours will be paid. Vacation hours may not be carried from year to year. On the last regular payday of each calendar year, all unused vacation time will be paid in full.

If any employee quits or is terminated before their anniversary date, any accrued vacation time will be paid in accordance with this article.

d) Bereavement Leave – Employees shall receive bereavement leave of three days duration, unpaid, in the event of the death of an immediate family member, including spouse, child, parent, sibling, step-parent, grandparent or in-law parents. Proof of death may be requested by the employer.

19. RENEWAL

a) This Agreement shall be effective on the 1st day of _____ 2014 and shall remain in full force and effect to and through the last day of _____ 2017. This agreement shall automatically renew for additional terms of one year unless one of the parties sends written notice by registered mail to the other of its intention to propose modifications hereto between 90 and 60 days prior to the termination date of this agreement, or any subsequent automatic extension.

b) This Agreement shall constitute the sole and entire agreement between the parties with respect to rates of pay, wages, hours and all other terms and conditions of employment. This Agreement may not be amended, modified, waived, extended or otherwise revised, and no agreement, alteration, understanding, variation, waiver or modification of any of the terms or conditions or covenants contained herein shall be made, unless made by agreement in writing duly executed by the parties hereto, except as set forth below in 19d.

c) Should any part or provision herein contained be rendered or declared invalid by reason of any existing or subsequently enacted legislation, by any decree of a court of competent jurisdiction or by reason of any rule or regulation or order of any presently existing or future created federal, state or municipal agency, such invalidation of such part or portion of this Agreement shall not invalidate the remaining portions hereof, and they shall remain in full force and effect.

d) In the event the Patient Protection and Affordable Care Act ("ACA") requires the Employer to make changes in the provision of healthcare under the collective bargaining agreement, the Employer and the Union agree that they will meet to discuss the changes that are required related to the Act. The parties agree that the discussions will only involve the changes needed to the healthcare related to the ACA. In the event there is a dispute over the ACA, the parties shall submit said dispute to arbitration in accordance with the grievance and arbitration provisions of this Agreement. The arbitrator shall have no authority and shall not require the Employer to pay more for medical coverage for employees.

20. HEALTH PLAN

~~Effective~~As ~~of~~ January 1, 2015, the Employer will offer the same ~~Qualified Health~~ Plan options, which includes the same and e employee co-contributions requirements, to eligible bargaining unit employees (~~currently those~~ employees who are scheduled to work on average thirty (30) hours or more per week), as the Eemployer offers to non-bargaining unit hourly employees at the facility covered by this Agreement.

IN WITNESS WHEREOF, the parties execute this agreement, effective as of _____ 1, 2014.

Exhibit F

William Anspach

From: stuart575@aol.com
Sent: Friday, July 25, 2014 4:52 PM
To: William Anspach
Subject: Apogee

July 24, 2014

Dear William,

I want to talk to Dave regarding what we discussed yesterday. However, I want to be clear on what was proposed and state only what was proposed. You stated that it was a package. Can you or Neil indicate the changes that the union would agree to in the document that I sent you. It will only take minutes to do this.

There are a couple of other issues to deal with. First, I will discuss with the company language on part-timers. Second, I will discuss the union security clause issue with the company.

Have a good weekend.

Stuart Weinberger
(212) 867-9595 (Ext. 313)

Exhibit G

William Anspach

From:	William Anspach
Sent:	Monday, July 28, 2014 9:17 AM
To:	stuart575@aol.com
Cc:	Neil Gonzalvo; Jack Caffey
Subject:	RE: Apogee

Hello Stuart:

What follows is the package agreement the Union proposed last Thursday. Other than typos you corrected, we will indicate below our position as to the various changes you made in your last proposal:

1. We agree to your language changes in Article 1.

2. We withdraw our bulletin board proposal in Article 1.

3. Union security and checkoff are still open in Article 3.

4. We withdraw our PAC proposal in Article 3.

5. We agree to your language change in Article 5(c).

6. We agree to your .25 wage propcsal for the first year (Article 7(a)).

7. In Article 18(b), the parties agreed to take out the phrase "with less than one year of service," so that the accrual applies to all employees. Accordingly, we also agreed to withdraw our proposal for 8 sick days.

8. Also in Article 18, we agreed to maintain whatever paid time off policies are now in effect for part-timers.

9. We agree to your changes in Article 20.

You told us on Thursday you'd be able to get back to us today. We look forward to your prompt response.

Thank you for your consideration.

Yours,

William

William Anspach
Friedman & Anspach
1500 Broadway, Suite 2300
New York, New York 10036
(212) 354-4500

Exhibit H

William Anspach

From:	stuart575@aol.com
Sent:	Monday, July 28, 2014 7:02 PM
To:	William Anspach
Cc:	ngonzalvo@local338.org; jcaffey@local338.org
Subject:	Re: Apogee

Dear William,

I forwarded the below proposal that you sent me today to the Company. I will get back to you tomorrow or Wednesday.

Stuart

-----Original Message-----
From: William Anspach <wanspach@friedmananspach.com>
To: stuart575 <stuart575@aol.com>
Cc: Neil Gonzalvo <ngonzalvo@local338.org>; Jack Caffey <jcaffey@local338.org>
Sent: Mon, Jul 28, 2014 9:17 am
Subject: RE: Apogee

Hello Stuart:

What follows is the package agreement the Union proposed last Thursday. Other than typos you corrected, we will indicate below our position as to the various changes you made in your last proposal:

1. We agree to your language changes in Article 1.

2. We withdraw our bulletin board proposal in Article 1.

3. Union security and checkoff are still open in Article 3.

4. We withdraw our PAC proposal in Article 3.

5. We agree to your language change in Article 5(c).

6. We agree to your .25 wage proposal for the first year (Article 7(a)).

7. In Article 18(b), the parties agreed to take out the phrase "with less than one year of service," so that the accrual applies to all employees. Accordingly, we also agreed to withdraw our proposal for 8 sick days.

8. Also in Article 18, we agreed to maintain whatever paid time off policies are now in effect for part-timers.

9. We agree to your changes in Article 20.

You told us on Thursday you'd be able to get back to us today. We look forward to your prompt response.

Thank you for your consideration.

Yours,

William

Exhibit I

William Anspach

From: William Anspach
Sent: Tuesday, July 29, 2014 9:29 AM
To: stuart575@aol.com
Cc: ngonzalvo@local338.org; jcaffey@local338.org
Subject: RE: Apogee

Hello Stuart:

There's no reason for any delay in a response – you told us last Thursday you'd get back to us by yesterday. We look forward to your immediate repay. Thank you for your consideration.

Yours,

William

William Anspach
Friedman & Anspach
1500 Broadway, Suite 2300
New York, New York 10036
(212) 354-4500
Facsimile: (212) 719-9072
wanspach@friedmananspach.com

From: stuart575@aol.com [mailto:stuart575@aol.com]
Sent: Monday, July 28, 2014 7:02 PM
To: William Anspach
Cc: ngonzalvo@local338.org; jcaffey@local338.org
Subject: Re: Apogee

Dear William,

I forwarded the below proposal that you sent me today to the Company. I will get back to you tomorrow or Wednesday.

Stuart

-----Original Message-----
From: William Anspach <wanspach@friedmananspach.com>
To: stuart575 <stuart575@aol.com>
Cc: Neil Gonzalvo <ngonzalvo@local338.org>; Jack Caffey <jcaffey@local338.org>

Exhibit J

William Anspach

From: stuart575@aol.com
Sent: Tuesday, July 29, 2014 10:14 PM
To: William Anspach
Subject: Re: Apogee

Dear William:

There was no a delay in any response. I asked Friday afternoon that you send me the proposal so that I could accurately convey to the Company exactly what the Union wanted to propose to the Company. I received your response yesterday, which contained the proposal.

There are apparently a few outstanding matters. I will have to provide you with language on the part-timers. The part-timer issue does not seem to an issue.

There are issues with the union security clause and the check-off. The Company is willing to discuss this matter to see if we can bargain some resolution of this matter.

I wanted to get back to you today. However, given the late hour, I want to make sure that I have not missed anything else.

Have a good night.

Stuart

-----Original Message-----
From: William Anspach <wanspach@friedmananspach.com>
To: stuart575 <stuart575@aol.com>
Cc: ngonzalvo <ngonzalvo@local338.org>; jcaffey <jcaffey@local338.org>
Sent: Tue, Jul 29, 2014 9:28 am
Subject: RE: Apogee

Hello Stuart:

There's no reason for any delay in a response – you told us last Thursday you'd get back to us by yesterday. We look forward to your immediate reply. Thank you for your consideration.

Yours,

William

William Anspach
Friedman & Anspach
1500 Broadway, Suite 2300
New York, New York 10036
(212) 354-4500
Facsimile: (212) 719-9072
wanspach@friedmananspach.com

Exhibit K

William Anspach

From:	William Anspach
Sent:	Wednesday, July 30, 2014 8:44 AM
To:	stuart575@aol.com
Cc:	Jack Caffey; Neil Gonzalvo
Subject:	FW: Apogee

Dear Stuart:

As of last Thursday, we made it clear that there are no remaining issues, other than the Union Security/Checkoff (you can provide language on the part-timers, but we've already agreed to accept your current policy).

Now, nearly a week later, we still need to know your client's position on the Union Security/Checkoff. I have yet to hear any reason for your client to reject those, particularly since we don't live in Alabama.

At this point, your client is simply delaying.

Yours,

William

William Anspach
Friedman & Anspach
1500 Broadway, Suite 2300
New York, New York 10036
(212) 354-4500
Facsimile: (212) 719-9072
wanspach@friedmananspach.com

From: stuart575@aol.com [mailto:stuart575@aol.com]
Sent: Tuesday, July 29, 2014 10:14 PM
To: William Anspach
Subject: Re: Apogee

Dear William:

There was no a delay in any response. I asked Friday afternoon that you send me the proposal so that I could accurately convey to the Company exactly what the Union wanted to propose to the Company. I received your response yesterday, which contained the proposal.

Exhibit L

William Anspach

From: stuart575@aol.com
Sent: Wednesday, July 30, 2014 11:39 PM
To: William Anspach
Subject: Re: Apogee

Dear William:

As I am sure that the Union is aware, there are contracts with unions that do not have dues check-off. I think the Union is aware that many employers do not wish to get involved in the check-off of dues for many reasons, including, but not limited to, that they do not want to responsible for checking-off dues and the issues that arise with checking off the dues.

While the union security provision is a mandatory subject of bargaining, the NLRB as recently as 2013 said the employer is not required to agree to a union security provision that is proposed by the Union. The ALJ in that case held that "[A]n employer may insist on not having a union-security clause at all.". Your statement that New York is not Alabama does not mean there are not contracts with unions that do not have a union security clause as proposed by the Union. I am sure that the Union is aware of the reasons why employers have not agreed to union security clauses that have been proposed by the Union.

In any event, the Company is willing to bargain with Union and discuss these provisions in accordance with applicable law.

I hope that all is well.

Stuart

-----Original Message-----
From: William Anspach <wanspach@friedmananspach.com>
To: stuart575 <stuart575@aol.com>
Cc: Jack Caffey <jcaffey@local338.org>; Neil Gonzalvo <ngonzalvo@local338.org>
Sent: Wed, Jul 30, 2014 8:44 am
Subject: FW: Apogee

Dear Stuart:

As of last Thursday, we made it clear that there are no remaining issues, other than the Union Security/Checkoff (you can provide language on the part-timers, but we've already agreed to accept your current policy).

Now, nearly a week later, we still need to know your client's position on the Union Security/Checkoff. I have yet to hear any reason for your client to reject those, particularly since we don't live in Alabama.

At this point, your client is simply delaying.

Yours,

William

William Anspach
Friedman & Anspach
1500 Broadway, Suite 2300
New York, New York 10036

Exhibit M

William Anspach

From: William Anspach
Sent: Thursday, July 31, 2014 8:38 AM
To: stuart575@aol.com
Cc: Jack Caffey; Neil Gonzalvo
Subject: RE: Apogee

Dear Stuart:

Since we're down to one issue (Union Security/Union Checkoff), we'd like to schedule a conference call today with you and your client to try to resolve it. Please indicate your availability. Thank you.

Yours,

William

William Anspach
Friedman & Anspach
1500 Broadway, Suite 2300
New York, New York 10036
(212) 354-4500
Facsimile: (212) 719-9072
wanspach@friedmananspach.com

From: stuart575@aol.com [mailto:stuart575@aol.com]
Sent: Wednesday, July 30, 2014 11:39 PM
To: William Anspach
Subject: Re: Apogee

Dear William:

As I am sure that the Union is aware, there are contracts with unions that do not have dues check-off. I think the Union is aware that many employers do not wish to get involved in the check-off of dues for many reasons, including, but not limited to, that they do not want to responsible for checking-off dues and the issues that arise with checking off the dues.

While the union security provision is a mandatory subject of bargaining, the NLRB as recently as 2013 said the employer is not required to agree to a union security provision that is proposed by the Union. The ALJ in that case held that "[A]n employer may insist on not having a union-security clause at all..". Your statement that New York is not Alabama does not mean there are not contracts with unions that do not have a union security clause as proposed by the Union. I am sure that the Union is aware of the ressons why employers have not agreed to union security clauses that have been proposed by the Union.

Exhibit N

William Anspach

From: Stuart Weinberger <stuart575@aol.com>
Sent: Thursday, July 31, 2014 11:50 AM
To: William Anspach

I am in Cherry Hill New Jersey now negotiating a contract.I am not available today for a conference call.

Sent from my Verizon Wireless 4G LTE smartphone

Exhibit O

William Anspach

From: stuart575@aol.com
Sent: Thursday, July 31, 2014 8:30 PM
To: William Anspach
Subject: Re:

Dear William,

I have meeting tomorrow on LI in the morning and possibly Yonkers in the early afternoon. I can try to squeeze something in tomorrow. The Company also has to be present on the call.

If you have any suggestions about arranging something for tomorrow, please e-mail them to me. We can also make arrangements to talk next week.

Have a good night.

Stuart

-----Original Message-----
From: William Anspach <wanspach@friedmananspach.com>
To: Stuart Weinberger <stuart575@aol.com>
Cc: Jack Caffey <jcaffey@local338.org>; Neil Gonzalvo <ngonzalvo@local338.org>
Sent: Thu, Jul 31, 2014 12:14 pm
Subject: RE:

Tomorrow?

William Anspach
Friedman & Anspach
1500 Broadway, Suite 2300
New York, New York 10036
(212) 354-4500
Facsimile: (212) 719-9072
wanspach@friedmananspach.com

From: Stuart Weinberger [mailto:stuart575@aol.com]
Sent: Thursday, July 31, 2014 11:50 AM
To: William Anspach
Subject:

I am in Cherry Hill New Jersey now negotiating a contract.I am not available today for a conference call.

Sent from my Verizon Wireless 4G LTE smartphone

Exhibit P

William Anspach

From: stuart575@aol.com
Sent: Friday, August 01, 2014 6:56 PM
To: William Anspach
Subject: Re: Unique

August 1, 2014

Dear William,

When I said last night I would try to squeeze in time I meant some solution like a call-in number. It is a sign that we are ready to bargain. We are ready to bargain. The Company has been and is ready to bargain. However, bargaining means for the Union that we have to agree to everything the Union wants. That is not bargaining.

I think filing the charge is a pretext to force the company to agree to a union security clause and a check-off provision and to delay the election. As I noted, there are union contracts without dues check-off. There are contracts without the union security provisions proposed by the Union. There is no case that says that the Board can force a party to agree to language that it does not want to agree to and has not agreed to.

Moreover, to say that the Company has not bargained in good faith is incredible. There have been dozens of discussions and meetings that the parties have had as well as agreements on issues including wages, medical, just cause for a discharge, grievance and arbitration, etc.

The Company is not going to respond to the Union's allegations about the running out the clock stuff, etc. If you want to bargain, the Union can call. The Union has my office and cell phone number. If you want to call my cell phone tonight, we can arrange for a time to bargain, which could be even tonight.

Stuart Weinberger

-----Original Message-----
From: William Anspach <wanspach@friedmananspach.com>
To: stuart575 <stuart575@aol.com>
Cc: Jack Caffey <jcaffey@local338.org>; Neil Gonzalvo <ngonzalvo@local338.org>
Sent: Fri, Aug 1, 2014 5:47 pm
Subject: Unique

Hello Stuart:

I never heard back from you (see e-mail exchange below).

As a courtesy, I wanted to tell you that the Union has filed a ULP against Unique for bad faith bargaining. The Union essentially agreed to all of the Employer's proposals on July 24 – since then, the Employer has used the pretext of opposition to a Union Security/Checkoff provision in order to avoid reaching an agreement, with the obvious purpose of running out the clock until the election.

While you point to case law reflecting that an employer is not always required to accept a Union Security clause, I believe the Board will consider the overall framework and chronology of the negotiations to conclude that the Employer's position is without foundation.

We will document to the Board that your client's bad faith bargaining has caused a decline in support for the Union leading up to the election.

Exhibit Q

William Anspach

From: William Anspach
Sent: Saturday, August 02, 2014 11:27 AM
To: stuart575@aol.com
Cc: Jack Caffey; Neil Gonzalvo
Subject: RE: Unique

Dear Stuart:

It's silly to say that the Union wants the Employer to agree to everything desired by the Union. Quite to the contrary – the Union has made a vast number of concessions in order to try to reach an agreement.

You're right that there's case law saying one party can't force another party to accept a proposal. But there's also abundant case law reflecting that one party can't turn down a proposal for no reason, particularly where it is the only remaining item.

As for the mechanics of bargaining, we made a package proposal on July 24. You said that day you would speak with your client and get back to us. You then asked us, unnecessarily in our view, to reiterate the package proposal, which we did. But we still never heard back from you.

If you wish to bargain, you can let us know when you and your client are available. Otherwise, we will continue to prosecute the charge.

Yours,

William

William Anspach
Friedman & Anspach
1500 Broadway, Suite 2300
New York, New York 10036
(212) 354-4500
Facsimile: (212) 719-9072
wanspach@friedmananspach.com

From: stuart575@aol.com [mailto:stuart575@aol.com]
Sent: Friday, August 01, 2014 6:56 PM

Exhibit R

From: stuart575 <stuart575@aol.com>
To: wanspach <wanspach@friedmanspach.com>
Subject: Re: Unique
Date: Sun, Aug 3, 2014 12:29 pm

August 3, 2014

Dear William:

I believe that you e-mail has several statements that are fundamentally incorrect. First, you keep saying that the Company has rejected the clauses for no reason. That is not true. I think my e-mail the other day outlined reasons. If not, we are certainly are willing to bargain and discuss these issues. I have e-mailed you several times in the last week that the Company is willing to bargain and talk about this?

Second, the Company has not summarily turned down these proposals. The Company is willing to discuse alternatives to the language proposed by the Union. The Union apparently does not want to discuss alternatives.

Third, within a matter of a couple of days or if not immediately, the Company has responded to all of the Union's proposal.

Fourth, I will repeat what I said above, the Company will bargain and diaquss the issues with the union. It is Sunday but I will try to contact the Company and see when we can talk. If the Union wants to present other alternatives, please send me the alternatives.

Enjoy the rest of the weekend.

Stuart

Exhibit S

William Anspach

From: stuart575@aol.com
Sent: Monday, August 04, 2014 3:28 PM
To: William Anspach
Subject: Re: Unique

We are available to talk by phone between 4:00 P.M. to 5:00 P.M. today.

----Original Message----
From: William Anspach <wanspach@friedmananspach.com>
To: stuart575 <stuart575@aol.com>
Sent: Mon, Aug 4, 2014 2:58 pm
Subject: RE: Unique

When are you and your client available today, so that I can check with the Union on its availability?

William Anspach
Friedman & Anspach
1500 Broadway, Suite 2300
New York, New York 10036
(212) 354-4500
Facsimile: (212) 719-9072
wanspach@friedmananspach.com

From: stuart575@aol.com [mailto:stuart575@aol.com]
Sent: Monday, August 04, 2014 2:38 PM
To: William Anspach
Subject: Re: Unique

August 4, 2014

Dear William,

We can have a conference later today. Otherwise we can make arrangements to talk tomorrow or another day.

Stuart

----Original Message----
From: William Anspach <wanspach@friedmananspach.com>
To: stuart575 <stuart575@aol.com>
Cc: Jack Caffey <jcaffey@local338.org>; Neil Gonzalvo <ngonzalvo@local338.org>
Sent: Sat, Aug 2, 2014 11:27 am
Subject: RE: Unique

Dear Stuart:

Exhibit T

William Anspach

From: William Anspach
Sent: Monday, August 04, 2014 4:16 PM
To: stuart575@aol.com
Subject: RE: Unique

The Union's not available during that period. I will check with the Union about its availability.

William Anspach
Friedman & Anspach
1500 Broadway, Suite 2300
New York, New York 10036
(212) 354-4500
Facsimile: (212) 719-9072
wanspach@friedmananspach.com

From: stuart575@aol.com [mailto:stuart575@aol.com]
Sent: Monday, August 04, 2014 3:28 PM
To: William Anspach
Subject: Re: Unique

We are available to talk by phone between 4:00 P.M. to 5:00 P.M. today.

-----Original Message-----
From: William Anspach <wanspach@friedmananspach.com>
To: stuart575 <stuart575@aol.com>
Sent: Mon, Aug 4, 2014 2:58 pm
Subject: RE: Unique

When are you and your client available today, so that I can check with the Union on its availability?

William Anspach
Friedman & Anspach
1500 Broadway, Suite 2300
New York, New York 10036
(212) 354-4500
Facsimile: (212) 719-9072
wanspach@friedmananspach.com

Exhibit U

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

APOGEE RETAIL, NY, LLC d/b/a UNIQUE THRIFT STORE

and

LOCAL 338, RWDSU/UFCW

Case Nos. 02-CA-133989
02-CA-134059
02-CA-137166

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, IT IS ORDERED THAT Case 02-CA-133989, Case 02-CA-134059, and Case 02-CA-137166, which are based on charges filed by Local 338, RWDSU/UFCW (the Charging Party) against Apogee Retail, NY, LLC d/b/a Unique Thrift Store (herein Respondent) are consolidated.

This Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Board's Rules and Regulations, and alleges Respondent has violated the Act as described below.

1. The charges in were filed by the Charging Party, as set forth in the following table, and served upon the Respondent on the dates indicated by U.S. mail:

Case No.	Amendment	Date Filed	Date Served
(a) 02-CA-133989		August 4, 2014	August 5, 2014
(b) 02-CA-134059		August 5, 2014	August 5, 2014
(c) 02-CA-134059	Amended	September 19, 2014	September 22, 2014
(d) 02-CA-137166		September 19, 2014	September 22, 2014
(e) 02-CA-137166	Amended	November 19, 2014	November 20, 2014
(f) 02-CA-134059	Second Amended	December 4, 2014	December 5, 2014

2. (a) At all material times, Respondent, a Delaware limited liability corporation, with an office and place of business located at 218 West 234th Street, Bronx, New York, herein called Respondent's facility, has been engaged in the retail sale of used clothing and household goods.

(b) Annually, Respondent, in the course and conduct of its business operations described above in subparagraph (a), derives gross revenue in excess of $500,000.

(c) Annually, Respondent, in the course and conduct of its business operations described above in subparagraph (a), purchases and receives at its facility goods and supplies valued in excess of $5,000 directly from suppliers located outside the State of New York.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent acting on its behalf:

(a)	David Koehler	Owner
(b)	Sameh Michill	Manager
(c)	Naomi Santana	Supervisor/Manager of Production

6. At all material times, Respondent's security guard (name unknown) has been an agent of Respondent within the meaning of Section 2(13) of the Act.

7. (a) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> **INCLUDED**: All full-time and regular part-time line workers, including workers carrying out functions such as Pricer, Pusher, Hanger, Sorter, Maintenance, Pick-Up, Cleaner, Sales Associate, Cashier, Floater, and Bagger, employed by the Employer at its facility located at 218 West 234th Street, Bronx, NY.
>
> **EXCLUDED**: All other employees, including office clerical employees, general managers, store managers, department managers, and guards, and professional employees and supervisors as defined in the Act.

(b) On June 17, 2013, the Board certified the Union as the exclusive collective-bargaining representative of the Unit.

(c) At all times since June 17, 2013, based on Section 9(a) of the Act, the Charging Party has been the exclusive collective-bargaining representative of the Unit.

8. Respondent, by Naomi Santana:

(a) About April 2014, at Respondent's facility, told employees that they had not received wage increases because they were represented by the Union.

(b) About mid-June 2014, at Respondent's facility, told employees that they had not received wage increases and would not receive wage increases because they were represented by the Union.

(c) Beginning about mid-June 2014 through August 7, 2014, on several occasions, at Respondent's facility, told employees that:

i. Employees had not received wage increases because they were represented by the Union;

ii. Employees would not receive wage increases so long as they were represented by the Union;

iii. Employees would have received wage increases if they were not represented by the Union; and

iv. Employees should work elsewhere if they wanted higher wages.

(d) Around mid-July 2014, on public transportation, told employees that they had not received wage increases because they were represented by the Union and that they would receive wage increases if employees rejected the Union as their bargaining representative.

(e) About August 7, 2014, at Respondent's facility, told employees that they had not received wage increases because they were represented by the Union and that they would receive wage increases and other benefits if employees rejected the Union as their bargaining representative.

9. Beginning about mid-June 2014, on several occasions, Respondent, by Sameh Michill, at Respondent's facility, told employees that that they had not received wage increases because they were represented by the Union.

10. About August 8, 2014, Respondent, by its security guard, in the parking lot next to Respondent's facility, by monitoring employees' conversations with a representative of the Charging Party, engaged in surveillance of employees who were engaged in Union activities.

11. (a) At various times from about August 2013, through August 4, 2014, Respondent and the Union met and conferred for the purposes of negotiating an initial collective-bargaining agreement with respect to wages, hours, and other terms and conditions of employment.

(b) During the period from July 9, 2014 through August 4, 2014, Respondent sought to avoid reaching agreement on a collective-bargaining agreement by:

(i) Failing and refusing to explain to the Union the reasons it would not agree to the Union's proposals that the contract include a union security clause and a dues checkoff clause; and

(ii) Failing and refusing to respond to the Union's proposal of July 24, 2014.

(c) By its overall conduct, including the conduct described above in sub-paragraph (b), Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.

12. By the conduct described above in paragraphs 8, 9 and 10, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

13. By the conduct described above in paragraph 11(b) and 11(c), Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

14. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHERFORE as part of the remedy for Respondent's unfair labor practices alleged above in paragraphs 8 through 13, the General Counsel seeks an Order requiring Respondent to post (and electronically distribute) notices in Spanish, in addition to English.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before February 13, 2015, or postmarked on or before February 12, 2015**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a

pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **March 17, 2015, at 9:30 a.m. at the Mary Taylor Walker Room at 26 Federal Plaza, Room 3614, New York, New York** and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: January 30, 2015
New York, New York

Karen P. Fernbach by TBJ
Karen P. Fernbach
Regional Director
National Labor Relations Board
Region 02
Federal Plaza Ste 3614
New York, NY 10278-3699

Attachments

EXHIBIT V

COLLECTIVE BARGAINING AGREEMENT

BETWEEN

LOCAL 338 RWDSU, UFCW

6/25/14

AND

APOGEE RETAIL, NY LLC d/b/a Unique Thrift Store

1. RECOGNITION

a) (1) Apogee Retail NY, LLC (hereafter "Employer") hereby recognizes the Retail, Wholesale, and Department Store Union (hereafter "Union") as the exclusive representative of all full-time and regular part-time line workers employed by the Employer at its facility located at 218 West 234th Street, Bronx, NY., including workers carrying out functions such as Pricer, Pusher, Hanger, Sorter, Maintenance, Pick-Up, Cleaner, Sales Associate, Cashier, Floater, and Bagger, but excluding all other employees, including office clerical employees, general managers, store managers, department managers, and guards, and professional employees and supervisors as defined in the Act.

(2) Bargaining unit work shall not be performed by other than bargaining unit employees except for owners, managers and supervisors that Employer deems necessary on a temporary basis.

Non bargaining unit employees may perform unit work for the purpose of instructing, training and assisting bargaining unit employees in the performance of their work. Non unit personnel may also perform unit work in emergencies, provided such work shall be of short duration (not to exceed three (3) consecutive days in the absence of consent of the Union which shall not be unreasonably withheld) and is not done for the purpose of reducing the size of the bargaining unit. 5 days

Redraft

b) (1) Representatives of the Union shall have the right to visit the Employer's place of business at reasonable times to investigate wages, hours working conditions and grievances. Such visits, however, shall not be made at such times or in such a manner that shall interfere with the operations of the Employer's business. The Union shall notify the Employer in advance of the Union's intention to visit the Employer's place of business. The Union agent shall have only access to areas at the Employer's place of business where the bargaining unit employees are located, at times where the bargaining unit employees are at the Employer's place of business or where it is necessary to investigate the wages, hours and working conditions.

(2) The Union will be permitted to post notices or distribute literature in any area of the Employer's premises to which the public does not have access and where work is otherwise not performed.

12th –

R-4

Exh. No: 4 Received Rejected
Case No.: 02-CA-133989 et al
Case Name: Apogee Retail
No. Pgs: Date: 4-1-15 Rep.: AM

(3) The Employer will provide bulletin board space, which shall be used ~~solely~~ for the purpose of posting authorized Union notices. ~~Said bulletin boards will be located in the stock room and break room.~~

(4) The Employer shall provide the Union with the names of all employees and their addresses, phone numbers and rates of pay within thirty (30) days after hire and every six months commencing upon the execution of the collective bargaining agreement upon request of the Union. ~~On a quarterly basis the Employer shall provide the Union with information necessary for the Union to ensure compliance with the terms of this agreement, including names of all employees (including newly hired employees), addresses, home and cell phone telephone numbers, and email addresses and employees' rates of pay and hours of work.~~

(5) The Employer and Union agree to meet as needed and is reasonable under the circumstances to administer this agreement.

~~(6) The Employer agrees to recognize the Union as the collective bargaining representative of any future bargaining unit in which the Union demonstrates a majority showing of interest in the form of signed cards. The Company agrees to abide by the certification of cards by a third party that is mutually agreeable to both parties at the time that the request for recognition letter is sent to the Company. If no mutually acceptable parties can be agreed to, the cards shall be reviewed and checked by the National Labor Relations Board.~~

2. MANAGEMENT RIGHTS/MODIFICATION

~~a) The Union shall deal with the Employer in good faith, including officers and agents selected by the Employer.~~

~~b) The Union recognizes that the Employer retains the right to exercise the customary functions of management in operating its facility, subject to the express limitations of this Agreement. The Employer may promulgate written work rules provide the rules do not violate any of the provisions of this Agreement. The Employer shall furnish the Union with a copy of any such work rules.~~

~~c) This agreement cannot be changed orally. Any changes must be in writing signed by the parties.~~

The Union recognizes the right of the Employer to establish and implement the policies of the Employer. It is recognized that the Employer retains the right to exercise the customary functions of management in operating its facility. Such rights shall include, but are not limited to, location of operation, types of equipment to be used or materials purchased or sold, and whether or to what extent any services or activities of any nature whatsoever shall be added, modified, eliminated or obtained by contract with any other company. These management rights also include the right to hire and determine the number of employees in the facility or a

department including the number assigned to any particular work, to increase or decrease the number of employees, ~~to sub contract,~~ to direct and assign work, to establish new job classifications and job content and qualifications, to determine when and where overtime shall be worked, to establish and schedule the working hours of the employees, to determine the reasonable work pace, work performance levels and standards of performance of the employees, to require safety devices and equipment, to layoff, to discipline for just cause, to discharge for just cause, to suspend for just cause, to transfer, to promote and to take any action considered necessary to establish and maintain efficiency and discipline. The Employer may promulgate written work rules provided the rules do not violate any of the provisions of this Agreement. The Employer shall furnish the Union with a copy of such work rules.

3. UNION SECURITY

a) As a condition of continued employment, all current employees who are covered by this contract shall, within ~~thirty-one (31)~~ ninety days (90) of the effective date of this agreement or the date of its execution, whichever is later, become and remain members in good standing of the Union. As a condition of employment, all employees hired after the effective or execution date of this agreement, whichever is later, shall become Union members within ~~thirty-one (31)~~ ninety days (90) days of becoming employed and shall remain members thereof.

b) Upon receipt of a written authorization from the Union, the Employer shall, pursuant to such authorization and provided such authorization has not been revoked, deduct from the wages due each such employee each pay period a regular share of the monthly union dues/fees and shall remit to the Union each month the dues/fees collected, together with a list of all employees for whom dues/fees are being remitted and an indication of the amount being remitted for each.

The Employer agrees to deduct and transmit to the Treasurer of RWDSU Local 338 PAC the amount specified for each hour worked from the wages of those employees who voluntarily authorize such contributions on the forms provided for that purpose by RWDSU Local 338 PAC. These transmittals shall occur monthly and shall be accompanied by a list of the names of those employees for whom such deductions have been made and the amount deducted for each such employee.

c) The Company may give notice to the Union of job openings, but the Company retains the right to use whatever sources it deems appropriate to obtain new hires and the Company's right to hire an employee shall be in the Company's sole discretion.

4. EMPLOYMENT/PROBATIONARY PERIOD

a) The Employer shall be the sole judge as to the qualifications of any applicant for employment.

b) All new employees hired by the Employer shall be subject to a probationary period of 90 days ~~(excluding three or more continuous absences)~~. All such probationary employees may be disciplined or discharged by the Employer during such probationary period without recourse by the Union or the employee and such discipline or discharge shall not be subject to the grievance and arbitration procedure contained herein. Probationary employees shall not be entitled to any of the benefits including, but not limited to, paid time off, provided in this Agreement until completion of the probationary period.

5. HOURS OF WORK/OVERTIME

a) (1) All hours actually worked in excess of forty (40) hours in one week shall be paid at the rate of one and one-half times the employee's regular straight-time hourly wage. All overtime must be authorized in advance by the Employer.

(2) Assignment of overtime work shall be in the discretion of the Employer, and the Employer may require any employee to work overtime on a reverse seniority basis. However, prior to mandatory overtime, the Employer shall offer overtime on a voluntary basis to qualified employees by seniority.

b) There shall be no pyramiding of overtime pay.

c) Schedules shall be posted at least two weeks in advance and shall list the employee by name. No employee shall be required to work a schedule where they work on more than six days out of the week. Schedules once posted shall remain in effect and shall not be changed without the consent of the employee, unless there is an emergency.

d) Full time employees are defined as those regularly scheduled to work forty (40) or more hours in a week. ~~The Employer may during its busy seasons (Easter, summer months, back-to-school and Christmas) temporarily increase the hours of part time employees, if the employee consents. Part time employees shall be entitled to all of the benefits provided in this Agreement.~~

~~f) Full time employees must constitute a minimum of 80% percent of the bargaining unit's work force. Employees with full time status shall not be reclassified to part time unless the employee consents.~~

g) All employees scheduled to work more than five (5) hours in a day shall be required to take a mandatory thirty (30) minute unpaid lunch or dinner break to begin no earlier than 2 hours after starting work and end no later than 2 hours before the end of the work day. There are no split shifts.

h) Any employee scheduled for 7 or more hours of work in a day shall be granted one half hour paid lunch or dinner break to begin no earlier than 3 hours after starting work or ending no later than 3 hours before the end of the work day. Employees shall have two 10 minute paid breaks not to be taken any closer than two hours before or after the lunch/dinner break. With the

consent of the employee the break may be taken together in conjunction with the meal period. Employee shall not be permitted to work through their breaks.

i) Employees shall be permitted to leave the premises of the employer on their meal period or break, provided that they return on time.

~~j) Schedules shall be posted no later than one week in advance, and shall list employees by name. Employees who do not work on Saturday or Sunday will be provided with a telephone number to contact a manager to find out their schedule for the coming week. Schedules shall not be changed without workers' written consent.~~

6. TRANSFERS

There shall be no transfer of any employee to another store. However, if an employee wishes to transfer to another store, the Employer may transfer the employee to that store, as long as the employee submits their request in writing and written notice is given to the Union. .

7. WAGES –

(a) All employees shall receive the following raises as follows:

Effective upon Ratification - $1.00 per hour (employees who have completed their trial period)

Effective one year after Ratification - $1.00 per hour (employees who have been employed for at least a year)

Effective two years after Ratification - $1.00 per hour (employees who have been employer for at least a year)

(b) Any employee who is on an approved leave of absence on the date of any of the wage increases above shall receive the increase upon return to their employment.

(c) Upon completion of their probationary period, the regular hourly rate for all employees shall be increased by thirty five ($0.35) cents per hour.

(d) The Company shall maintain its current ~~payment schedule~~ and method unless it notifies the Union of a change.

(e) All appropriate statutory deductions shall be made ~~from payroll checks issued to employees~~. The Employer shall cover all employees in accordance with the law for disability insurance, unemployment insurance and workers compensation.

8. CHILD LABOR - withdraw Union Proposal

None of the Employer's work may be performed in violation of child labor laws.

9. SENIORITY

a) Seniority shall be measured for purpose of layoff and recall by date of hire. Should layoffs become necessary, layoffs and recall shall be made on the basis of seniority. All employees laid off shall have recall rights for up to six (6) months and the Employer shall not hire new employees before recalling laid off employees who have the right to recall. An employee's failure to respond or return from recall within five (5) days of confirmed receipt of a recall letter (as established by use of certified mail) shall terminate the employee's recall rights. All correspondence referenced in this paragraph shall be copied to the Union.

b) At least two weeks before any layoff is implemented the Employer shall notify the union in writing of the date of the layoff, the identity of the employee to be laid off ~~and any offers of other employment conveyed to the employee to avoid a layoff as well as the amount of severance to be paid~~.

10. DISCIPLINE/DISCHARGE

a) No employee covered by this agreement shall be disciplined, suspended or discharged except for just cause. The Employer shall ~~endeavor to give the Union 24 hours advance notice of a suspension or discharge and in every event must~~ give the Union notice within ~~24~~ 72 96 hours after issuing a suspension or discharge.

11. GRIEVANCE AND ARBITRATION

a) A grievance shall be defined as any dispute between the Union and the Employer arising out of the interpretation or application of this Agreement, other than matters referred to in this Agreement as excluded from or limited under the provisions of this Article. A grievance shall be disposed of as follows:

Step 1. Within ten calendar days of the occurrence (or when the Union or affected employee(s) reasonably should have known of the occurrence) giving rise to the grievance, the aggrieved employee, shop steward or Union representative shall discuss the matter with the employee's immediate supervisor, who shall, if authorized, attempt to provide a satisfactory resolution of the matter.

Step 2. Unless a satisfactory resolution is reached at Step 1, the grievance may, within ten calendar days of the Step 1 meeting or, if later, the employer's response to the grievance, be submitted to the Employer's designee (identified to the Union in advance) in a writing signed by the Union, which shall set forth a statement of the facts and provisions of this Agreement upon

which the grievance is based and upon which the Union relies in support of the grievance. The Employer shall reply in writing to the grievance within ten calendar days after receipt thereof.

Step 3. If no satisfactory resolution of the grievance has been reached in Step 2, either party to this Agreement may, within fifteen (15) calendar days after the Employer's reply under Step 2, submit a demand for arbitration to the other party with a copy of such demand to the Impartial Arbitrator, Roger Maher. In the event Roger Maher is unable or unwilling to serve on a particular matter, Robert Herzog shall be designated as Impartial Arbitrator for that matter.

b) Any grievance filed by the Employer shall be initiated, in writing, to the Union. The parties shall then endeavor to resolve the grievance through meeting and/or discussion of the issues raised in the grievance. In the event the parties are unable to satisfactorily resolve the grievance, the Employer may submit a demand for arbitration to the other party with a copy of such demand to the Impartial Arbitrator, Roger Maher.

c) The decision of the Arbitrator shall be final and binding upon the parties. The Arbitrator shall have no power to add to, subtract from, or otherwise modify this Agreement.

d) A grievance by the Employer, a grievance concerning a discharge or discipline of an employee, or grievances which are matters of general concern or which apply to all employees, may be instituted by either of the parties to this Agreement directly at Step 2.

e) The Employer's failure to reply to a grievance shall not be deemed acquiescence thereto or as a bar to arbitration of such grievance, and the Union may proceed to the next step.

f) In the event of the Employer's failure to timely provide notice to the Union of a discharge or other discipline as set forth in Article 9, paragraph (a) above, the grievance must be instituted within ten calendar days of the Union's receipt of such notice.

g) Discharges or other disciplinary actions taken against any employee during the employee's probationary period shall not be subject to the grievance and arbitration procedure and shall in all respects be without recourse by the Union.

h) The Union may designate one or more shop stewards. The steward shall be allowed to investigate or take a grievance while on paid time provided that the doing so shall not interfere with the employer's operations. Stewards shall not be considered agents of the Union for any purpose and shall not have the power or authority to bind the Union or to reach agreements with the Employer at variance with the specific terms and conditions of this Agreement. **(Open - The employer will propose other language)**

12. NO STRIKES/NO LOCKOUTS

a) The Union agrees that during the term of this Agreement neither it nor any employee(s) covered by this Agreement will cause, sanction, encourage or engage in any strike, walkout, or sympathy strike at the employer's premises. picketing

b) During the term of this Agreement the Employer shall not engage in a lockout.

(Open to discussion)

13. JURY DUTY

An employee summoned to jury duty shall immediately inform and provide a copy of the summons to the Employer. In such event, the employee shall be given an unpaid leave of absence to attend to jury duty.

14. LEAVES OF ABSENCE

a) The Employer may grant leaves of absence, in writing, to employees desiring them not to exceed ninety (90) days. The Employer may extend the leave based on an individual's circumstances. Such leaves shall be without pay. Seniority shall not be broken provided the employee timely returns from the leave. ~~During any such temporary leave, the Employer may replace the employee with a temporary new hire. Such temporary employee shall be covered by this contract, except that his/her termination shall not be subject to the grievance and arbitration procedures contained herein. Any employee hired as a temporary employee under this Section shall be informed in writing (with a copy to the Union) of his/her temporary status at the time of hire.~~

~~b) Before hiring a temporary employee the Employer shall notify the Union in writing of its intention to do so and the duration of the employment and the name of the employee on leave. Also a copy of the leave of absence shall be provided the Union. Any temporary employee, who continues to be employed beyond his original term of hire, shall be covered by all the terms of this Agreement except that he does not have to complete a probationary period of employment provided that he/she has been employed for more than 60 days as a temporary.~~

c) The employer shall give FMLA leave as required by law.

15. UNIFORMS

Employees shall not be required to pay for uniforms required by the Employer to be worn on the job. The Employer will provide employees with new uniforms two times a year, and will provide one replacement uniform per year in the case that a uniform is lost, stolen or ruined.

16. EQUAL RIGHTS

There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, sexual orientation, union membership, or any

characteristic protected by law~~, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the American Disabilities Act, the Age Discrimination in Employment Act, 42 U.S.C. 1981, the Family and Medical Leave Act, the New York State Executive, the New York City Administrative Code or any other similar laws, rules and regulations. All such claims shall be subject to the grievance and arbitration procedure as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.~~

The Employer shall not discriminate against any present or future employee or applicant for employment by reason of race, creed, color, age, disability, national origin, sex, sexual orientation, union membership, marital or parental status, gender identity or expression, pregnancy or any other characteristic protected by local, state or federal law.

The foregoing shall not prohibit or limit in any way the obligation of the employer under law to accommodate an employee's needs to participate in religious observances and/or the Sabbath.

17. HEALTH AND SAFETY

a) The Employer shall have clean and functioning rest rooms for use by the employees; proper ladders; potable water for consumption by employees; first aid kit, rubber gloves and ~~respirators and/or face masks~~ for use by the employees; and shall have periodic and regular visits by a professional exterminating service~~, to control for rats, fleas and other vermin.~~ Adequate heat and air conditioning shall be provided.

~~b) A Health and Safety Committee including employee representative selected by the Union shall meet as agreed to by the parties, but in any event no less than once every three months. Employees shall be compensated for the time they are meeting or preparing for a meeting.~~

c) Employees shall not be ~~required~~ disciplined for not participating in company sponsored exercise sessions.

~~d) The Union retains the right to grieve any workload or workload increases that are unreasonable compared to industry standards.~~

18. PAID TIME OFF

a). Holidays – Any employee working on the following holidays shall be paid double time for all hours worked that day: New Year's Day, Martin Luther King Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day. If the store is closed for the holiday, employees normally scheduled to work on that day shall be paid time and one half for their regularly scheduled hours for that day. Schedules shall not be changed to avoid payment of holiday pay,

except that the Employer shall determine whether a store is to remain open on any particular day, including a holiday.

b). Sick Days/Personal Days – All employees will one year of service of more shall receive 8 paid sick/personal days. Employees with less than one year of service shall accrue one paid sick/personal day per two months of service. This section is intended to comply with NYC Law Number 2013/046, providing for sick time earned by employees.

1. Sick days shall be taken because of illness or the illness of a dependent, or due to a doctor's appointment or the doctor's appointment of a dependent, and the employee shall receive the pay for the hours they were scheduled to work that day, provided that the employee notifies the employer within one hour of the starting time of their shift of their absence due to sickness. Such days may also be scheduled in advance as a personal day with pay provided that the employee and the employer agree, it being understood that the employer will not unreasonably withhold its consent. Unused sick days will be bought back and paid, at the full rate, in the first pay check received in January of each year. An employee may choose to carry over up to ten (10) unused sick days into the next calendar year provided, however, that the employee gives the Employer written notice of such intent by November 1st. An employee can accrue up to a maximum of thirty (30) days of sick leave.

c) Vacation – All employees with one or more years of service shall receive paid time off each year equal to one week. Employees with two or more years of service shall receive paid time off each year equal to two weeks. Employees with five or more years of service shall receive paid time off each year equal to three weeks.

1. Eligibility for vacation shall be determined as of the beginning of each calendar year. Employees with less than the requisite year(s) of service as of the beginning of the calendar year must wait until their anniversary date to be eligible to take the vacation. Vacations are to be scheduled by mutual consent of the employer and the employee. Employees who do not take their vacation entitlement by the end of the calendar year shall be paid for their unused vacation time. The employee may also choose to take their unused vacation from one year in the first quarter of the next calendar year.

c.) Bereavement Leave – Employees shall receive bereavement leave of three days duration, unpaid, in the event of the death of an immediate family member, including spouse, child, parent, sibling, step-parent, grandparent or in-law parents. Proof of death may be requested by the employer.

d.) In the event a location is shut down, employees who lose their jobs as a consequence of the shutdown shall be entitled to receive payment for unused sick time, vacation or any other paid time off and shall be entitled to the benefits provided under Article 19, Severance.

e) All paid time off benefits shall be prorated for part time employees. All employees entitled to receive vacation with pay shall receive a full week off regardless of how many days they are scheduled to work in a week. Part-time employees shall receive vacation pay equal to the average number of hours they were scheduled to work for the 13 weeks prior to taking the vacation. All employees who take a sick or personal day shall receive pay equal to the number of hours they were scheduled to work that day.

Open – the Union will accept the schedule as it appears in the Employee Handbook for Holidays and Vacation, language to be discussed)

19. RENEWAL

a) This Agreement shall be effective on the 1st day of _____ 2014 and shall remain in full force and effect to and through the last day of _____ 2017. This agreement shall automatically renew for additional terms of one year unless one of the parties sends written notice by registered mail to the other of its intention to propose modifications hereto between 90 and 60 days prior to the termination date of this agreement, or any subsequent automatic extension.

b) This Agreement shall constitute the sole and entire agreement between the parties with respect to rates of pay, wages, hours and all other terms and conditions of employment. This Agreement may not be amended, modified, waived, extended or otherwise revised, and no agreement, alteration, understanding, variation, waiver or modification of any of the terms or conditions or covenants contained herein shall be made, unless made by agreement in writing duly executed by the parties hereto.

c) Should any part or provision herein contained be rendered or declared invalid by reason of any existing or subsequently enacted legislation, by any decree of a court of competent jurisdiction or by reason of any rule or regulation or order of any presently existing or future created federal, state or municipal agency, such invalidation of such part or portion of this Agreement shall not invalidate the remaining portions hereof, and they shall remain in full force and effect.

20. SEVERANCE - **withdraw**

~~Except in the event of liquidation in bankruptcy, in the event a location is shut down or otherwise discontinued all employees with 1 or more years of service shall receive two weeks' pay per year of service as severance pay. Employees with six months of service shall receive 1 weeks' pay as severance pay. Severance shall be paid on the basis of the employee's regularly scheduled number of hours during the year before the shutdown.~~

21. HEALTH AND WELFARE PLAN – RESERVED – **waiting for Employers response**

IN WITNESS WHEREOF, the parties execute this agreement, effective as of _____ 1, 2014.

FOR LOCAL 338 RWDSU, UFCW

By: _____

Print Name/Title

FOR THE EMPLOYER

By: _____

Print Name/Title

(1) Employer Medical, Co-Contribution

(2) Wages .25, .25, .25.

EXHIBIT W

9c

Exh. No: 15 Received ✓ Rejected
Case No.: 02-CA-133989 et al
Case Name: Apogee Retail
No. Pgs: ___ Date: 4-2-15 Rep.: An

6/26/14
6
3M
DK

Union
N.
J. C

1(a) (2) Except for owners, managers + supervisors
non-bargaining unit 5 consecutive days

(b) (2) - withdrawn
(3) - No
(4) - no pledge - ok
(5) - withdrawn
2 - Issue of sub-contract
agency workers

3. a+b

Bolded - look at
3c - okay

4 (3) - 90 days probation

5(a)(1) - okay
(2) - issue on schedule. Co needs flexibility. Union concerned about changing schedules
Union Manager makes schedule. Makes mistakes then changes. Union - this is not an emergency
(d) - strike out part-timers
(g) - okay
(h) - withdraw
(i) - okay
6. Transfers - "involuntary"
7 Wages -
6 - Over 30% increase

Union No increases since bargaining. ~~Look at~~ Say

6-6 7 days

(d) - Current ~~pay day~~ pay period + pay date + method unless -

e - All appropriate deductions shall be made by the Employer

8. Withdrawn

9a basis of seniority and qualification
Employer - scale of ~~[illegible]~~ qualification

10. a - Change second sentence

11 - Co to propose

12 - ~~[illegible]~~ Okay

13 - ~~[illegible]~~ Agree with Company.

14. Send language - Leave of absence

15 - Uniforms - accept

16 Equal Rights

~~[illegible]~~ Open issue
Union against [illegible]
Co wants [illegible]

Co points out ~~at~~ irony of leaving discrimination

17 a Tex.

C - Company rejects ~~[illegible]~~

14. Will accept in handbook in holidays rarely

b) ~~[illegible]~~ agree to own such leave schedule

Accrue on your sick leave, Fix language
4 hours a month - Part time
2 Vacation + Holiday pay same as Landlord
Bereavement - okay

19
(h) - Send Language

Company

$.25 at end of probation
$.25 @ 1 anniversary.
$.25 - 2nd year
.25 - 3rd year

EXHIBIT X

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Ms. Karen Fernbach
National Labor Relations Board
Region 2
26 Federal Plaza
New York, NY 10278

December 24, 2014

Regarding: Apogee Retail NY, LLC

Case Numbers.: 2-CA-137166 and 2-CA-134059

GC
Exh. No: 16 Received ___ Rejected
Case No.: 03-CA-133998
Case Name: Apogee Retail
No. Pgs: ___ Date: 4-2-15 Rep.: KA

Dear Ms. Fernbach:

Our firm represents Apogee ("Apogee" or "Company"). I have been informed that you intend to issue a complaint finding that Apogee has refused to bargain in good faith regarding the union and security clause and dues check-off issues. The Company requests that you re-consider your decision to issue a complaint alleging that Apogee did not bargain in good faith. As demonstrated below, Apogee bargained in good faith on these issues. Moreover, you should also reconsider your decision to issue a complaint that the Company committed unfair labor practices by allegedly telling employees that they would receive raises if the employees were no longer represented by Local 338, RWDSU, UFCW ("Local 338"). Apogee asserts that the evidence does not support that Apogee told employees that they would receive a wage increase if they were no longer represented by the Union.

Based upon our conversation, the Region apparently has the belief that Apogee engaged in a coordinated effort to get rid of the Union by inducing employees to sign a petition (or some other document) to decertify the Union and by bargaining in bad faith before the election to accomplish the goal of getting the rid of the Union. This notion is contradicted by objective evidence and is unsupportable. First, the Company asserts it never induced employees to sign anything to decertify the Union and denies the allegations attendant to this allegation. As for the allegation that the Company bargained in bad faith, the Region did not know or did not take into account that the bargaining came to an abrupt halt before the election because the Union left to attend a convention in Orlando, Florida. The indisputable evidence below shows that the Company had not been given any notice that the Union would be unavailable to bargain the week of the election because it was attending a convention in Orlando.

With respect to the claim about the Company bargaining in bad faith regarding the check-off and the union security clause issues, the objective evidence supports beyond any doubt that Apogee bargained in good faith about these matters. As I told you I knew that there is some case law, which the Region is relying upon, that states that an employer has to give the reason why it does not want to agree to a union security clause. Assuming that this is good law that you must give a reason, Apogee complied with the case law by telling the Union the reasons why it did not want to agree both to a union security clause and a dues check-off. It seems inexplicable that the Region could find a violation when the obligation is to bargain and discuss (possibly under the case law) the reasons, which is what Apogee did and wanted to do with respect to these matters. Moreover, the remedy for this supposed violation would be to bargain and (possibly) discuss the reasons, which Apogee did and wanted to do with the Union.

In fact, before going through the sequence of events, I think it is important to note that Apogee want far beyond its obligations under the National Labor Relations Act. Apogee offered to bargain on Friday night and Sunday. Ironically, is being viewed as running out the clock when, as discussed below, it was the Union that disappeared to go to a convention.

The Region apparently has the mistaken notion that union security and dues check-off were never discussed until July, 2014. This is ridiculous. Is it believable that the first time there issues were discussed were a year after bargaining started? While the Region made a broad based and unsupported request for all the bargaining notes without explaining why, the Region did not ask Apogee what happened with respect to negotiating the provisions union security clause and dues check-off.

When bargaining started in August of last year, the International, which was bargaining at that time, at the first meeting presented a union security clause and dues check-off proposal. The Company informed the International that the union security clause that was proposed by the International was illegal. The clauses were discussed subsequently.

When Local 338 took over, the Company bargained with the Union. The parties bargained in person and by telephone. It is almost conceivable that the Union would claim that these issues were not discussed.

Of course they were discussed with the Union. For example, on June 26, the Company discussed with the Union proposals made by the Union regarding union security clause, check-off, and PAC contributions. The Company indicated that it was willing to deduct monies if the employees voluntarily wanted to contribute to the Union's PAC but did not want to be in a position where the employees might be required in the case of a union security clause to pay monies. (Check-off presents different issues than voluntary contributions. If the Region needs an explanation of the difference, I will be glad to provide and explanation. Check-off, for example, becomes difficult when employees do not work a complete period and monies have to be remitted.) It is simply false to claim that the Company never discussed why it did not want to

have the union security clause and dues check-off. In fact, during this discussion, Apogee told the Union that it might not be able to deduct PAC contributions from an employee's pay because under New York Law there may be a prohibition against deducting monies for this reason. (New York Law only allows deduction in pay for certain reasons.) Subsequently, Apogee confirmed its belief that the proposal was unlawful. The Union ultimately withdrew the proposal.

After this June meeting, the parties met, discussed the contract by telephone and communicated by e-mail in July, 2014. Proposals were sent back and forth by the parties.

In one of these discussions the Union does not accurately (or maybe completely) portray what transpired on July 24th. I was on the phone with William Anspach, Esq., and the Union. Without getting into details on why (which includes that the Company was not present on the call) I asked the Union on July 25th to put in writing what it was proposing in response to the Company's last proposal.

On July 28th, Anspach sent me an e-mail indicating that the Union would agree to the Company's proposal as a package. The package included the union security and check-off that had not been agreed to by the parties.

Literally almost 24 hours later, in the morning of July 29th, Anspach sent me an e-mail asking why there was a delay in a response to the proposal. Of course, it took Anspach three days after I had asked Anspach on July 25th to put the proposal in writing. Apparently the Union's position is that it gets three days to respond while the Company gets about twenty-four hours.

I responded that day that there was no delay. I replied that there were outstanding issues on language involving part-timers as well as union security and dues check-off. I further stated that the Company was willing to bargain with the Union about these issues.

On July 30th, Anspach said that I could provide language on the part-time issue. He then added in the e-mail:

> Now, nearly a week later, we still need to know your client's position on the Union Security Checkoff. I have yet to hear any reason for your client to reject those, particularly since we don't live in Alabama.

Actually Anspach had yet to hear any reason because he was only present at one negotiation. Moreover before this e-mail, when did he ever ask for any reason regarding "Union Security/Checkoff?" The e-mail gives the misleading impression that this is the first time this issue was discussed and that a demand for the reason had been made before July 30th. I would

like to be informed by the Region what date the Union made such a request for the reasons before July 30th.

That day, I specifically said in an e-mail in response as follows:

> As I am sure that the Union is aware, there are contracts with unions that do not have dues check-off. I think the Union is aware that many employers do not wish to get involved in the check-off of dues for many reasons, including, but not limited to, that they do not want to responsible for checking-off dues and the issues that arise with checking off the dues..
>
> While the union security provision is a mandatory subject of bargaining, the NLRB as recently as 2013 said the employer is not required to agree to a union security provision that is proposed by the Union The ALJ in that case held that "[A]n employer may insist on not having a union-security clause at all..". Your statement that New York is not Alabama does not mean there are not contracts with unions that do not have a union security clause as proposed by the Union. I am sure that the Union is aware of the reasons why employers have not agreed to union security clauses that have been proposed by the Union.
>
> In any event, the Company is willing to bargain with Union and discuss these provisions in accordance with applicable law. [Emphasis added]

Given that, in the first paragraph of the above e-mail, Apogee gave the reason for not wanting a dues check-off, how can the Region conclude that Apogee bargained in bad faith for not giving a reason? I would like an explanation of this.

In addition, I replied to Anspach that he knows the reasons (which are not secret) why employers do not agree to union security clauses. (As I said to you, I am aware of a large RDWSU bargaining in New York City that does not have a union security clause.) I also said in the letter that Apogee was willing to meet and bargain and **"discuss"** these provisions. If it was not clear of the reasons before, Apogee certainly was willing to make it clear. Moreover, what else could Apogee have done to try to resolve these issues and to convey its positions regarding these issues? That is what bargaining is: to meet and discuss issues with a goal of resolving issues.

The next day, July 31st, Anspach sent me an e-mail asking that a conference call be arranged. I e-mailed back that I was in negotiations in Cherry Hill involving a nursing home and that I was not available for a conference call. Anspach replied that the Union would be available tomorrow.

At 8:30 P.M. that night, I said I had two meeting the next day. I told him that I wanted to try to squeeze the call in and that the Company had to be present. I asked him to e-mail me if he had "any suggestions about arranging something for tomorrow." At 9:12 P.M., he replies that the Union is available at any time but does not suggest how to have this call.

The next day, Friday, August 1st, Anspach sent me an e-mail that he is filing a charge and that he has not heard back from me. I respond back with the following e-mail:

> When I said last night I would try to squeeze in time I meant some solution like a call-in number. It is a sign that we are ready to bargain. We are ready to bargain. The Company has been and is ready to bargain. However, bargaining means for the Union that we have to agree to everything the Union wants. That is not bargaining.
>
> I think filing the charge is a pretext to force the company to agree to a union security clause and a check-off provision and to delay the election. As I noted, there are union contracts without dues check-off. There are contracts without the union security provisions proposed by the Union. There is no case that says that the Board can force a party to agree to language that it does not want to agree to and has not agreed to.
>
> Moreover, to say that the Company has not bargained in good faith is incredible. There have been dozens of discussions and meetings that the parties have had as well as agreements on issues including wages, medical, just cause for a discharge, grievance and arbitration, etc.
>
> **The Company is not going to respond to the Union's allegations about the running out the clock stuff, etc. If you want to bargain, the Union can call. The Union has my office and cell phone number. If you want to call my cell phone tonight, we can arrange for a time to bargain, which could be even tonight.** [Emphasis added]

It is again remarkable that the Union says that the Company is bargaining in bad faith when the Company kept saying that it wanted to bargain, even offering to bargain **on Friday night**. Of course, it is conceivable that the Union negotiators (not Anspach) were already on their way to Florida.

Further this whole allegation of bad faith bargaining is based upon a proposal made by the Union **one week before** on July 24th and put into writing on July 28th. It is inexplicable how the Union can claim bad faith when you continually within hours, if

not by the next day, and because you are unavailable to talk for only one day (Thursday). In other words, the Union has tried to make the year of bargaining (discussions, meetings, etc.) disappear because matters were not resolved to the Union's liking over the course of literally a few days. What makes this claim even more incredible is that the Union did not tell the Company that it is not available to meet next week because of a convention and that it was the Union that was unavailable to bargain and discuss these issues. It was the Union, not Apogee, that ran out the clock.

Anspach responds the next day, Saturday, as follows:

> It's silly to say that the Union wants the Employer to agree to everything desired by the Union. Quite to the contrary – the Union has made a vast number of concessions in order to try to reach an agreement.
>
> You're right that there's case law saying one party can't force another party to accept a proposal. But there's also abundant case law reflecting that one party can't turn down a proposal for no reason, particularly where it is the only remaining item.
>
> **As for the mechanics of bargaining, we made a package proposal on July 24. You said that day you would speak with your client and get back to us. You then asked us, unnecessarily in our view, to reiterate the package proposal, which we did. But we still never heard back from you.**
>
> **If you wish to bargain, you can let us know when you and your client are available. Otherwise, we will continue to prosecute the charge.** [Emphasis added]

This e-mail was clearly incorrect. For example, in the third paragraph, Anspach claimed that the Company never responded to the proposal. The Company responded by pointing out the issues involving part-timers as well as the union security and the dues check-off.

Moreover, in the last paragraph of Saturday's e-mail, the Union offered to bargain. The next day, **Sunday**, Apogee accepted the offer, responding to the e-mail as follows:

> **I believe that your e-mail has several statements that are fundamentally incorrect. First, you keep saying that the Company has rejected the clauses for no reason. That is not true. I think my e-mail the other day outlined reasons. If not, we are certainly are willing to bargain and**

discuss these issues. I have e-mailed you several times in the last week that the Company is willing to bargain and talk about this?

Second, the Company has not summarily turned down these proposals. The Company is willing to discuss alternatives to the language proposed by the Union. The Union apparently does not want to discuss alternatives.

Third, within a matter of a couple of days or if not immediately, the Company has responded to all of the Union's proposal.

Fourth, I will repeat what I said above, the Company will bargain and discuss the issues with the union. It is Sunday but I will try to contact the Company and see when we can talk. If the Union wants to present other alternatives, please send me the alternatives.

Enjoy the rest of the weekend.

Again it is ironic that the Union claims that Apogee bargained when the Union offers to bargain, Apogee and then the Union declines to bargain. Clearly and unequivocally Apogee said it would discuss all the issues, including the reasons for its proposals. What more could Apogee have done than say it would bargain and discuss the reasons? The Union went to a convention and was unable to bargain. Apogee was willing to bargain. In fact, the Union never again asked to bargain after it said it was unavailable and that it would get back to the Company. The first time we really talked was last week after Apogee made a request to bargain.

I think the foregoing should correct any mistaken belief by the Region that the Company was stalling by not agreeing to the Union's proposal. First, the Union ran out the clock. The Company stated at least on **three different days** that it was willing to discuss this issue and give reasons (again) after Anspach raised the issue in his e-mail on July 30th. If the Union is unavailable how can the Company bargain and discuss the reasons? Second, the Union could have withdrawn the proposals. Third, the Union could have offered alternatives, which the Company suggested that the Union provide to the Company.

This case clearly must be re-considered. If the Region is going to issue a complaint on bad faith bargaining, I would like to know what the remedy would be other than to bargain and possibly give the reasons. This is exactly what the Company tried to do with the Union but could not through no fault of its own.

Similarly, with respect to the claim that Apogee made statements which induced employees to file a petition to decertify the Union, resulting in the Region seeking to have the petition dismissed, I think the Region should reconsider this determination as well.. Unfortunately, the Region has not and maybe cannot provide enough information to Apogee to refute the allegations of this type without going to a hearing. The main reason is that is impossible for Apogee to respond because it has no idea of the facts, including when these statements were made and how many people were present. Vague allegations that statements were made by this supervisor in certain months does not really allow Apogee to provide a defense to the Region. Even as of today, Apogee does not know the facts, other than the statement that on some occasions statements were made. If I am wrong about this, I would like someone from the Region to explain what other facts were provided to Apogee.

Further, as I have said to the Region, the person who allegedly made these statements knows nothing about wages increases and has nothing to do with increases. The Company would like to cooperate even more than it has on this issue. However, it does not know how it can unless the Region gives more information (dates, times, places, approximately employees were promised the increases, etc.) regarding the allegations.

In sum, the Company requests that you reconsider the allegation that the Company did not bargain in good faith. It is simply unsupportable and wrong. In light of the foregoing, if the Region still seeks to continue with the claim of bad faith bargaining, I would like to know how the Region can conclude that the Company did not offer to bargain, did not give the reasons and did not offer again to give the reasons. I also would like to know what the remedy would be for this supposed violation.

The Company also requests that you reconsider the allegations with respect to the wage increase. Apogee hopes that there is some way to cooperate better to get this allegation dismissed.

Thank you for the reconsideration of this matter.

Very truly yours,
/s/ Stuart Weinberger
Stuart Weinberger

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